

12-23-2011

# Mosell Equities, LLC v. Berryhill & Co., Inc. Clerk's Record v. 1 Dckt. 38338

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MOSELL EQUITIES, LLC, an Idaho limited  
liability company,

Plaintiff-Respondent-Cross Appellant,  
vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation,

Defendant-Appellant-Cross Respondent,  
and

JOHN E. BERRYHILL, III,

Defendant-Cross Respondent,  
and

AMY BERRYHILL,

Defendant.

Supreme Court Case No. 38338

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE DENNIS GOFF

DANIEL E. WILLIAMS

ATTORNEY FOR APPELLANT

BOISE, IDAHO

ERIC R. CLARK

ATTORNEY FOR RESPONDENT

EAGLE, IDAHO

Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User		Judge
5/28/2009	NCOC	CCGARDAL	New Case Filed - Other Claims	Patricia Young
	COMP	CCGARDAL	Complaint Filed	Patricia Young
	SMFI	CCGARDAL	Summons Filed	Patricia Young
6/8/2009	AFOS	CCGDULKA	Affidavit Of Service (06/03/09)	Cheri C. Copsey
	NOAP	CCHOLMEE	Notice Of Appearance (Williams for Berryhill & Company Inc, John e Berryhill III and Amy Berryhill)	Cheri C. Copsey
	MOTN	CCHOLMEE	Motion for Disqualification of Judge Without Cause	Cheri C. Copsey
6/16/2009	ORDQ	CCNELSRF	Order Granting Motion for Disqualification of Judge w/o Cause	Cheri C. Copsey
	CJWO	CCNELSRF	Change Assigned Judge: Disqualification W/O Cause	Darla S. Williamson
	NOTC	CCNELSRF	Notice of Reassignment to Judge Darla Williamson	Darla S. Williamson
7/1/2009	MOTN	CCHOLMEE	Motion to Dismiss	Darla S. Williamson
	MEMO	CCHOLMEE	Memorandum in Support of Motion to Dismiss	Darla S. Williamson
	MOTN	CCHOLMEE	Motion for a Protective Order	Darla S. Williamson
	AFFD	CCHOLMEE	Affidavit of Daniel E Williams Re: Motion	Darla S. Williamson
	MEMO	CCHOLMEE	Memorandum in Support of Motion	Darla S. Williamson
7/6/2009	NOTH	CCPRICDL	Notice Of Hearing on Defendant's Motion to Dismiss and Motion for Protective Order	Darla S. Williamson
	HRSC	CCPRICDL	Hearing Scheduled (Motion 07/22/2009 02:45 PM) Motion to Dismiss and Motion for Protective Order	Darla S. Williamson
7/10/2009	RSPS	CCAMESLC	Response to Motion to Dismiss and Motion for Protective Order	Darla S. Williamson
7/20/2009	RPLY	CCSIMMSM	Reply in Support of Motion to Dismiss	Darla S. Williamson
7/22/2009	DCHH	DCKORSJP	Hearing result for Motion held on 07/22/2009 02:45 PM: District Court Hearing Held Court Reporter: Penny Tardiff Number of Transcript Pages for this hearing estimated: Less than 100 Pages Motion to Dismiss and Motion for Protective Order	Darla S. Williamson
9/14/2009	AMCO	CCRANDJD	Amended Complaint Filed	Darla S. Williamson
	MOTN	CCRANDJD	Motion to Reconsider the Courts Dismissal of John and Amy Berryhill	Darla S. Williamson
	MEMO	CCRANDJD	Memorandum in Support of Motion to Reconsider	Darla S. Williamson
9/21/2009	MOTN	CCWRIGRM	Mosell Equities Motion to Compel Responses and Requests	Darla S. Williamson
	AFFD	CCWRIGRM	Affidavit of Counsel	Darla S. Williamson
9/22/2009	HRSC	MCBIEHKJ	Notice of Hearing Scheduled (Motion to Compel 10/14/2009 02:45 PM)	Darla S. Williamson
9/28/2009	AFFD	MCBIEHKJ	Affidavit of Daniel E Williams	Darla S. Williamson

Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User	Judge
9/29/2009	NOTH	CCPRICDL	Notice Of Hearing on Motion to Reconsider the Courts Dismissal of Defendants John and Amy Berryhill
10/6/2009	OBJE	CCHOLMEE	Objection to the Defendants Renewed Motion for Protective Order
10/7/2009	MEMO	CCGARDAL	Defendant's Memorandum in Opposition to Plaintiff's Motion to Reconsider
10/14/2009	DCHH	DCKORSJP	Hearing result for Motion to Compel held on 10/14/2009 02:45 PM: District Court Hearing Held Court Reporter: Penny Tardiff Number of Transcript Pages for this hearing estimated: Less than 100 Pages and Motion for Reconsider the Courts Dismissal
	HRSC	DCKORSJP	Hearing Scheduled (Motion to Dismiss 11/18/2009 02:45 PM)
10/15/2009	NOTS	CCSIMMSM	Notice Of Service
10/29/2009	HRVC	DCTHERTL	Hearing result for Motion to Dismiss held on 11/18/2009 02:45 PM: Hearing Vacated
	NOHG	CCTOWNRD	Notice Of Hearing
	HRSC	CCTOWNRD	Hearing Scheduled (Motion to Dismiss 12/02/2009 02:45 PM) 2nd Motion
11/3/2009	MOTN	MCBIEHKJ	Second Motion to Dismiss
	NOID	MCBIEHKJ	Notice Of Intent To Take Default
11/6/2009	MOTN	CCAMESLC	Motion to Strike Three Day Notice of Intent to Take Default and Default Judgment
	AFSM	CCAMESLC	Affidavit In Support Of Motion to Strike and Take Default
	MEMO	CCAMESLC	Memorandum in Support of Motion to Strike and take Default
11/9/2009	NOTC	MCBIEHKJ	Notice of Hearing (12/2/09 @ 2:45 PM)
11/10/2009	AFFD	CCBOURPT	Affidavit of Eric Clark Filed in Opposition to Defendants Motion to Strike Plaintiff's ThreeDay Notice of Intent to take Default and Filed in Support of Plaintiff's Motions for Sanctions
	RSPS	CCBOURPT	Response to Defendants' Motion to Strike Plaintiff's Three Day Notice of INTent to take Default and Default Judgment and Motion for Sactions
11/18/2009	MEMO	CCAMESLC	Memorandum in Support of Motion to Dismiss
11/25/2009	RSPS	CCDWONCP	Plaintiff's Response to Defendants' Second Motion to Dismiss
11/30/2009	NOTS	MCBIEHKJ	Notice Of Service
	REPL	CCLATICJ	Defendant's Reply Brief in Support of Second Motion to Dismiss
	AFFD	CCLATICJ	Affidavit of Daniel E. Williams Re Plaintiff's Motion for Sanctions



Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User	Judge
11/30/2009	MEMO	CCLATICJ	Defendants' Reply Memorandum in Support of Motion to Strike Plaintiff's Three-Day Notice of Intent to Take Default and in Opposition to Plaintiff's Motion for Sanctions
12/2/2009	DCHH	DCKORSJP	Hearing result for Motion to Dismiss held on 12/02/2009 02:45 PM: District Court Hearing Held Court Reporter: Penny Tardiff Number of Transcript Pages for this hearing estimated: Less than 100 Pages 2nd Motion
12/4/2009	DEOP	CCCHILER	Memorandum Decision and Order Re: Defendants' Second Motion to Dismiss and Motion to Strike Three Day Notice of Intent to Take Default
12/10/2009	NOTS	CCWRIGRM	Notice Of Service
12/15/2009	HRSC	DCKORSJP	Hearing Scheduled (Jury Trial 06/21/2010 08:30 AM)
		DCKORSJP	Notice of Trial Setting and Order Governing Further Proceedings
12/21/2009	ANSW	CCAMESLC	Answer and Counterclaim (Williams for Berryhill & Co, John and Amy Berryhill)
12/24/2009	NOSV	CCGARDAL	Notice Of Service
1/5/2010	NOTD	CCTOWNRD	Notice Of Taking Deposition
1/11/2010	NOSV	CCHOLMEE	Notice Of Service
1/15/2010	STIP	MCBIEHKJ	Stipulation for Scheduling and Planning
	NOTS	CCWRIGRM	Notice Of Service
1/22/2010	RPLY	CCLATICJ	Reply to Counterclaim and Demand for Jury Trial (Clark for Mosell Equities)
3/1/2010	NOTD	MCBIEHKJ	Notice Of Taking Deposition
3/11/2010	NOTD	MCBIEHKJ	Notice Of Taking Deposition
3/12/2010	MOTN	CCTOWNRD	Motion to Quash Notice of Deposition
	NOHG	CCTOWNRD	Notice Of Hearing
	HRSC	CCTOWNRD	Hearing Scheduled (Motion 04/07/2010 02:45 PM) Motion to Quash
3/16/2010	NOTD	CCTOWNRD	Notice Of Taking Deposition
3/17/2010	NOTS	MCBIEHKJ	Notice Of Service
3/22/2010	MOTN	CCSULLJA	Plaintiff's Motion for Partial Summary Judgment
	MEMO	CCSULLJA	Memorandum in Support of Motion for Partial Summary Judgment
	AFFD	CCSULLJA	Affidavit of Glenn Mosell
	NOTH	CCWRIGRM	Notice Of Hearing (04/21/10 @ 2:45pm)
	HRSC	CCWRIGRM	Hearing Scheduled (Hearing Scheduled 04/21/2010 02:45 PM) Motion for Partial Summary Judgment
	MOSJ	CCWRIGRM	Defendants Motion For Summary Judgment

Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User	Judge
3/22/2010	MEMO	CCWRIGRM	Defendants Memorandum in Support of Motion
	AFFD	CCWRIGRM	Affidavit of John E Berryhill
	AFFD	CCWRIGRM	Affidavit of Daniel E Williams
	NOTH	CCWRIGRM	Notice Of Hearing (04/21/10 @ 2:45pm)
3/26/2010	MOTN	MCBIEHKJ	Motion to Compel
	AFFD	MCBIEHKJ	Affidavit of Daniel E Williams
	MEMO	MCBIEHKJ	Memorandum in Support of Motion to Compel
4/7/2010	HRVC	DCKORSJP	Hearing result for Motion held on 04/07/2010 02:45 PM: Hearing Vacated Motion to Quash
	NOTD	MCBIEHKJ	(2)Notice Of Taking Deposition
	MOTN	CCBOYIDR	Motion to Amend Complaint to Include a Claim for Punitive Damages
	MEMO	CCBOYIDR	Memorandum Filed in Support of it's Motion to Amend Complaint to add a Claim for Punitive Damages
	RSPN	CCBOYIDR	Plaintiff's Response to Defendant's Motion for Summary Judgment
	OBJE	CCBOYIDR	*****Objection to Excerpts of the Affidavits of Gery W. Edson, Robert A. Renteria, and David C. Cooper***** (Pleading Entered in Error, Pleading Belongs in Case CVOC0915884)
	AFFD	CCBOYIDR	Affidavit of Glenn E. Mosell Filed in Opposition to Defendant's Motion for Summary Judgment
	NOHG	CCBOYIDR	Notice Of Hearing (Motion to Amend Complaint to Include a Claim for Punitive Damages 4-21-10 @ 2:45 PM)
	MEMO	CCBOURPT	Memorandum of Defendant in Opposition to Plaintiff's Motion for Partial Summary Judgment
	AFFD	CCBOURPT	Affidavit In Opposition to Plaintiff's Motion for partial Summary Judgment
4/9/2010	NOTD	MCBIEHKJ	Notice Of Taking Deposition
4/13/2010	STIP	DCKORSJP	Stipulated Protective Order
4/14/2010	REPL	CCMASTLW	Reply Memorandum in Support of Motion for Partial Summary Judgment
	MOTN	CCMASTLW	Motion for Protective Order
	MEMO	CCMASTLW	Memorandum in Support
	MOTN	CCMASTLW	Motion to Strike
	MEMO	CCMASTLW	Memorandum in Support
	REPL	CCMASTLW	Reply Brief in Support of Motion for Summary Judgment
	MOTN	CCMASTLW	Motion to Strike
	MEMO	CCMASTLW	Memorandum in Support

Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User	Judge
4/14/2010	MEMO	CCMASTLW	Memorandum in Opposition to Motion to Amend Complaint
4/20/2010	MEMO	MCBIEHKJ	Memorandum Filed in Opposition to Motion to Strike
	REPL	MCBIEHKJ	Reply Memorandum Filed in Support of Motion to Amend Complaint
	NOTD	MCBIEHKJ	Notice Of Taking Deposition
	MOTN	CCLATICJ	Motion to Supplement Record on Summary Judgment
	AFFD	CCLATICJ	Affidavit of Daniel E. Williams re Motion to Supplement Record on Summary Judgment
	MEMO	CCLATICJ	Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike the Affidavit of John E. Berryhill III
4/21/2010	DCHH	DCKORSJP	Hearing result for Hearing Scheduled held on 04/21/2010 02:45 PM: District Court Hearing Held Court Reporter: Penny Tardiff Number of Transcript Pages for this hearing estimated: Less than 100 Pages Motion for Partial Summary Judgment and Motion for Summary Judgment
4/27/2010	ORDR	DCKORSJP	Order Granting Defendant's Motion to Compel
4/29/2010	NOTS	MCBIEHKJ	Notice Of Service
4/30/2010	DEOP	DCKORSJP	Memorandum Decision & Order Re: Cros Motions for Summary Judgment, Motions to Strike, Motion to Amend Complaint & Motion to Compel
5/7/2010	NOSV	CCHOLMEE	Notice Of Service
5/12/2010	MOTN	MCBIEHKJ	Motion for Sanctions and to Vacate Trial Setting
	AFFD	MCBIEHKJ	Affidavit of Daniel E Williams
5/13/2010	NOTS	MCBIEHKJ	Notice Of Service
	AFFD	MCBIEHKJ	Affidavit of Counsel Filed in Opposition to Motion for Sanctions
5/14/2010	AFFD	CCRANDJD	Second Affidavit of Daniel Williams re Motion for Sanctions and to Vacate Trial Setting
	MOTN	CCRANDJD	Motion to Shorten Time for Hearing on Motion for Sanctions and to Vacate Trial Setting
	AFSM	CCRANDJD	Affidavit In Support Of Motion
	NOHG	CCRANDJD	Notice Of Hearing re Motion to Shorten Time (05.19.10@2:45pm)
	HRSC	CCRANDJD	Hearing Scheduled (Motion 05/19/2010 02:45 PM) Motion to Shorten Time on Motion for Sanctions
5/17/2010	ORDR	DCKORSJP	Order Granting Motion to Shorten Time for Hearing on Def's Motion for Sanctions & to Vacate Trial Setting

Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User		Judge
5/18/2010	MEMO	CCMCLILI	Plaintiff's Memorandum in Response to Defendants Motion for Sanctions & to Vacate Trial Setting	Darla S. Williamson
	MOTN	CCMCLILI	Mosell Equities' Motion to Compel Responses to Plaintiff's Third Set of Requests for Production of Documents	Darla S. Williamson
	AFFD	CCMCLILI	Affidavit of Counsel Filed in Support of Mosell Equities' Motion to Compel Responses to Plaintiff's Third Set of Requests for Production of Documents	Darla S. Williamson
	MEMO	CCMCLILI	Memorandum in Support of Mosell Equities' Motion to Compel Responses to Plaintiff's Third Set of Requests for Production of Documents	Darla S. Williamson
5/19/2010	NOHG	CCLATICJ	Notice Of Hearing re Mosell Equities' Motion to Compel Discovery (06/09/10 @ 2:45 pm)	Darla S. Williamson
	HRSC	CCLATICJ	Hearing Scheduled (Motion to Compel 06/09/2010 02:45 PM)	Darla S. Williamson
	DCHH	DCKORSJP	Hearing result for Motion held on 05/19/2010 02:45 PM: District Court Hearing Held Court Reporter: No Court Reporter Number of Transcript Pages for this hearing estimated: Less than 100 Pages Motion to Shorten Time on Motion for Sanctions	Darla S. Williamson
5/21/2010	HRVC	DCKORSJP	Hearing result for Jury Trial held on 06/21/2010 08:30 AM: Hearing Vacated	Darla S. Williamson
	HRSC	DCKORSJP	Hearing Scheduled (Jury Trial 08/02/2010 08:30 AM)	Darla S. Williamson
		DCKORSJP	Notice of Trial Setting and Order Governing Further Proceedings	Darla S. Williamson
5/25/2010	NOHG	CCSIMMSM	Supplemental Notice Of Hearing (Motion to Compel of Plaintiff's First, Second, and Third Sets of Discovery Requests	Darla S. Williamson
	MOTN	CCSULLJA	Mosell Equities' Motion to Compel Responses to Plaintiff's First and Second Set of Interrogatories and Requests for Production of Documents to Defendants	Darla S. Williamson
	AFFD	CCSULLJA	Affidavit of Counsel Filed in Support of Mosell Equities' Motion to Compel Responses to Plaintiff's First and Second Set of Interrogatories and Requests for Production of Documents to Defendants	Darla S. Williamson
	MEMO	CCSULLJA	Plaintiff's Memorandum in Support of Mosell Equities' Motion to Compel Responses to Plaintiff's First and Second Set of Interrogatories and Requests for Production of Documents to Defendants	Darla S. Williamson
5/26/2010	NOTS	MCBIEHKJ	Notice Of Service	Darla S. Williamson
6/2/2010	MOTN	CCGARDAL	Motion to Amend Complaint	Darla S. Williamson
	MEMO	CCGARDAL	Memorandum in Support of Motion to Amend	Darla S. Williamson

Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User		Judge
6/2/2010	NOHG	CCGARDAL	Notice Of Hearing 6.30.10 @ 2:45pm	Darla S. Williamson
	HRSC	CCGARDAL	Hearing Scheduled (Motion to Amend 06/30/2010 02:45 PM)	Darla S. Williamson
6/3/2010	AMEN	CCWRIGRM	Amended Notice of Taking the Deposition of Glenn Mosell	Darla S. Williamson
6/7/2010	MEMO	CCWRIGRM	Defendants Memorandum in Opposition to Plaintiffs Motions to Compel	Darla S. Williamson
6/9/2010	DCHH	DCKORSJP	Hearing result for Motion to Compel held on 06/09/2010 02:45 PM: District Court Hearing Held Court Reporter: Jayleen Tillman Number of Transcript Pages for this hearing estimated: Less than 100 Pages	Darla S. Williamson
6/23/2010	AFFD	CCWRIGRM	Affidavit of Daniel E Williams	Darla S. Williamson
	MEMO	CCWRIGRM	Defendants Memorandum in Opposition to Plaintiffs Motion to File Second Amended Complaint	Darla S. Williamson
6/25/2010	REPL	CCSULLJA	Plaintiff's Reply Memorandum Filed in Support of Its Motion to Amend Complaint	Darla S. Williamson
6/30/2010	DCHH	DCKORSJP	Hearing result for Motion to Amend held on 06/30/2010 02:45 PM: District Court Hearing Held Court Reporter: No Court Reporter Number of Transcript Pages for this hearing estimated: Less than 100 Pages	Darla S. Williamson
7/2/2010	NOTS	CCAMESLC	Notice Of Service	Darla S. Williamson
	DEWI	CCAMESLC	Defendant's Witness List	Darla S. Williamson
	NOTS	CCTOWNRD	Notice Of Service	Darla S. Williamson
	MISC	CCWRIGRM	Mosell Equities Disclosure of Lay Witnesses for Trial	Darla S. Williamson
7/12/2010	NOTC	DCKORSJP	Notice of PreTrial Conference	Darla S. Williamson
	HRSC	DCKORSJP	Hearing Scheduled (Pretrial Conference 07/21/2010 02:45 PM)	Darla S. Williamson
7/21/2010	DCHH	DCKORSJP	Hearing result for Pretrial Conference held on 07/21/2010 02:45 PM: District Court Hearing Held Court Reporter: Penny Tardiff Number of Transcript Pages for this hearing estimated: Less than 100 Pages	Darla S. Williamson
	HRSC	DCKORSJP	Hearing Scheduled (Motion in Limine 07/30/2010 09:00 AM)	Darla S. Williamson
7/23/2010	NOTS	MCBIEHKJ	Notice Of Service	Darla S. Williamson
7/26/2010	HRVC	DCKORSJP	Hearing result for Motion in Limine held on 07/30/2010 09:00 AM: Hearing Vacated	Darla S. Williamson
7/29/2010	STIP	CCKINGAJ	Stipulation to Vacate and Reset Trial Date and Hearing Date	Darla S. Williamson
8/2/2010	HRVC	DCKORSJP	Hearing result for Jury Trial held on 08/02/2010 08:30 AM: Hearing Vacated	Darla S. Williamson

Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User	Judge
8/2/2010	HRSC	DCKORSJP	Hearing Scheduled (Jury Trial 09/07/2010 08:30 AM)
8/4/2010	ORDR	DCKORSJP	Order to Vacate and Reset Trial Date and Hearing Date
8/25/2010	MISC	DCKORSJP	PreTrial Order
8/27/2010	MOTN	CCSWEECE	Defendants Motion In Limine
	MOTN	CCSWEECE	Plaintiffs Motion In Limine To Exclude Irrelevant Evidence: Other Litigation
	MOTN	CCSWEECE	Plaintiffs Motion In Limine To Exclude Irrelevant Evidence: Assignment Of Potential Proceeds As Collateral For Loan
8/30/2010	MEMO	CCSWEECE	Defendants Memorandum In Opposition To Motion In Limine RE: Other Litigation
8/31/2010	JRYI	CCGARDAL	Proposed Jury Instructions and Verdict Form
	HRSC	CCNELSRF	Hearing Scheduled (Motion in Limine 08/31/2010 01:30 PM)
	DCHH	CCNELSRF	Hearing result for Motion in Limine held on 08/31/2010 01:30 PM: District Court Hearing Held Court Reporter: no court reporter Number of Transcript Pages for this hearing estimated:
	MISC	MCBIEHKJ	Defendants Special Verdict
	MISC	MCBIEHKJ	Requested Jury Instructions
9/3/2010	BREF	CCRANDJD	Defendants Trial Brief
	MISC	CCMASTLW	Defendants' Supplemental Witness Disclosures
9/7/2010	MISC	CCNELSRF	Mosell Equities' Disclosure Of Trial Exhibits
	DCHH	CCNELSRF	Hearing result for Jury Trial held on 09/07/2010 08:30 AM: District Court Hearing Held Court Reporter: Diane Cromwell Number of Transcript Pages for this hearing estimated: less than 500 Day 1
	HRSC	CCNELSRF	Hearing Scheduled (Jury Trial 09/08/2010 09:00 AM) Day 2
9/8/2010	HRSC	CCNELSRF	Hearing Scheduled (Jury Trial 09/09/2010 09:00 AM) Day 3
	EXLT	CCNELSRF	Defendant's Exhibit List
	BREF	CCNELSRF	Trial Bench Brief: Admissibility of Extrinsic Evidence of Defendant's Prior Inconsistent Statement
	DCHH	CCNELSRF	Hearing result for Jury Trial held on 09/08/2010 09:00 AM: District Court Hearing Held Court Reporter:, NONE Number of Transcript Pages for this hearing estimated: ,NONE Day 2
9/9/2010	HRSC	CCNELSRF	Hearing Scheduled (Jury Trial 09/14/2010 09:00 AM) Day 4

Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User	Judge
9/9/2010	DCHH	CCNELSRF	Hearing result for Jury Trial held on 09/09/2010 09:00 AM: District Court Hearing Held Court Reporter: ,None Number of Transcript Pages for this hearing estimated: None.... Day 3 Darla S. Williamson
9/13/2010	AFOS	MCBIEHKJ	(5)Affidavit Of Service of Subpoena Darla S. Williamson
9/14/2010	HRSC	CCNELSRF	Hearing Scheduled (Jury Trial 09/15/2010 09:00 AM) Day 5 Darla S. Williamson
	HRSC	CCNELSRF	Hearing Scheduled (Jury Trial 09/16/2010 09:00 AM) Day 6 Darla S. Williamson
	DCHH	CCNELSRF	Hearing result for Jury Trial held on 09/14/2010 09:00 AM: District Court Hearing Held Court Reporter: , NONE Number of Transcript Pages for this hearing estimated: , NONE Day 4 Darla S. Williamson
9/15/2010	DCHH	CCNELSRF	Hearing result for Jury Trial held on 09/15/2010 09:00 AM: District Court Hearing Held Court Reporter: None Number of Transcript Pages for this hearing estimated: None Day 5 Darla S. Williamson
	HRVC	CCNELSRF	Hearing result for Jury Trial held on 09/16/2010 09:00 AM: Hearing Vacated Day 6 Darla S. Williamson
	PLJI	DCTYLENI	Plaintiff's Requested Jury Instructions-Court Modified and Filed Dennis E. Goff
	DFJI	DCTYLENI	Defendants Requested Jury Instructions-Court Modified and Filed Dennis E. Goff
	JRYI	CCNELSRF	Jury Instructions Darla S. Williamson
	VERD	CCNELSRF	Verdict Form Darla S. Williamson
9/17/2010	MOTN	MCBIEHKJ	Motion in Limine to Exclude Irrelevant Evidence Darla S. Williamson
9/21/2010	MEMO	CCAMESLC	Memorandum in Support of Plaintiff's Motion for Judgment Not Withstanding the Verdict or in the Alternative Motion for a New trial Darla S. Williamson
	NOTH	CCJOYCCN	Notice Of Hearing (10/6/2010 at 9:00 a.m.) Darla S. Williamson
	HRSC	CCJOYCCN	Hearing Scheduled (Motion 10/06/2010 09:00 AM) Motion for JNOV, and in the Alternative, Motion for New Trial Darla S. Williamson
9/29/2010	MEMO	CCSIMMSM	Defendants' Memorandum in Opposition to Plaintiff's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for new Trial Darla S. Williamson
10/1/2010	MEMO	CCSULLJA	Reply Memorandum in Support of Plaintiff's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial Darla S. Williamson
10/4/2010	CONT	DCTYLENI	Continued (Motion 10/07/2010 03:00 PM) Motion for JNOV, and in the Alternative, Motion for New Trial Dennis E. Goff
	AMEN	DCTYLENI	Amended Notice of Hearing (10/7/10 @ 3:00 p.m.) Dennis E. Goff

Mosell Equities LLC vs. Berryhill &amp; Company Inc, John E Berryhill III, Amy Berryhill

Date	Code	User		Judge
10/7/2010	DCHH	TCJOHNKA	Hearing result for Motion held on 10/07/2010 03:00 PM: District Court Hearing Held Court Reporter: No reporter Number of Transcript Pages for this hearing estimated: less than 100 pages	Dennis E. Goff
10/26/2010	ORDR	DCTYLENI	Order Granting Plaintiff's Motion for Judgment Notwithstanding the Verdict on Count 1 of Its Complaint	Dennis E. Goff
10/29/2010	HRSC	DCKORSJP	Hearing Scheduled (Status 11/10/2010 02:45 PM)	Darla S. Williamson
		DCKORSJP	Notice of Hearing	Darla S. Williamson
11/4/2010	MOTN	CCRANDJD	Motion to Amend/Correct Order	Darla S. Williamson
	MEMO	CCRANDJD	Memorandum in Support of Motion to Amend Correct Order	Darla S. Williamson
11/5/2010	OBJC	CCKINGAJ	Objection & Opposition to Defenant's Motion to Amend/Correct Order	Darla S. Williamson
	AFFD	CCKINGAJ	Affidavit of Eric R Clark Filed in Opposition to Defendant's Motion to Correct/Amend Order	Darla S. Williamson
11/10/2010	HRVC	DCKORSJP	Hearing result for Status held on 11/10/2010 02:45 PM: Hearing Vacated	Darla S. Williamson
11/23/2010	ORDR	DCTYLENI	Order of Clarification	Dennis E. Goff
12/2/2010	RQST	CCRANDJD	Request for Trial Setting	Darla S. Williamson
12/6/2010	APSC	CCLUNDMJ	Appealed To The Supreme Court	Darla S. Williamson
12/17/2010	NOTC	CCHOLMEE	Notice of Cross Appeal	Darla S. Williamson
1/10/2011	JDMT	DCTYLENI	Judgment	Darla S. Williamson
	INAC	DCTYLENI	Inactive (Stayed Pending Decision on SC Appeal)	Darla S. Williamson
	STAT	DCTYLENI	STATUS CHANGED: inactive	Dennis E. Goff



**MAY 28 2009**

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
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Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. **CV OC 0909974**

**COMPLAINT  
AND  
DEMAND FOR JURY TRIAL**

\* \* \* \* \*

The Plaintiff, by and through counsel, hereby complains and alleges as follows:

**PARTIES AND JURISDICTION**

1. At all times relevant to these proceedings, the Plaintiff Mosell Equities, LLC, was a Limited Liability Company with its principle place of business in Eagle, Idaho. Glenn Mosell is the owner and sole member of Mosell Equities.

W

2. At all times relevant to these proceedings the Defendant Berryhill & Company, Inc. was a duly formed corporation operating in Ada County, Idaho. Defendant John E. Berryhill III is the President of Berryhill & Company, and operates Berryhill & Co. restaurant in Boise, Idaho. Defendant Amy Berryhill is the Secretary of Berryhill & Company.

3. At all times relevant to these proceedings the Defendants John and Amy Berryhill resided in Ada County, Idaho, as husband and wife.

4. The amount claimed for damages exceeds \$10,000.00, the jurisdictional limit of this Court.

#### **FACTS AND ALLEGATIONS**

5. Between June 2007 and April 2008, Mosell Equities made various loans to Berryhill & Company, totaling FOUR HUNDRED FIVE THOUSAND DOLLARS (\$405,000.00).

6. Mosell Equities loaned these funds to Berryhill & Company while Glenn Mosell and John Berryhill were considering establishing a business relationship, initially in a company called MOBERRY, and subsequently, by Mosell Equities acquiring a 50% ownership in Berryhill & Company, Berryhill's established corporation.

7. The parties retained legal counsel who drafted the appropriate entity and operational documents. However, MOBERRY was never formed and Mosell Equities never acquired its 50% ownership interest in Berryhill & Company

8. As the parties never pursued their prospective ventures, Mosell Equities' loaned funds remained as loans to Berryhill & Company.

9. The parties never formalized loan documents in writing, but Glenn Mosell noted that Mosell Equities' funds were "loans" to Berryhill & Company on the checks Mosell issued to Berryhill & Company.

10. Thereafter, Berryhill & Company carried the loans in its financial records as obligations to Mosell Equities.

11. Prior to filing this action, Mosell Equities provided written demand upon John Berryhill and Berryhill & Company for repayment of the loaned funds. Berryhill and his company replied by refusing to refund the loans and by claiming the loans were not really loans at all.

12. Mosell Equities also purchased furniture and fixtures, with a value of TEN THOUSAND FIVE HUNDRED THIRTY-TWO DOLLARS (\$10,532.00), which Berryhill & Company possesses, continues to use, and refuses to return to Mosell Equities.

#### **COUNT ONE - BREACH OF AN ORAL CONTRACT**

13. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

14. Mosell Equities loaned money to Berryhill & Company and Berryhill & Company agreed to repay the debt by accepting the money. The parties were competent, the contract was for a lawful purpose, there was valid consideration, and the material terms (the contract was for a loan) and tangential terms were either agreed upon by the parties or are established by statute (interest rate) or law (time for performance).

15. After requesting repayment, Berryhill & Company denied the parties had contracted, asserted that no loan existed, and refused to repay the loan.

16. By refusing to repay the loan, Berryhill & Company is in breach and that breach is material.

17. As a direct, proximate and consequential result of Berryhill & Company's breach, Mosell Equities has and continues to suffer damages in the amount of \$405,000.00 plus accumulating statutory interest.

**COUNT TWO - BREACH OF AN IMPLIED-IN-FACT CONTRACT**

18. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

19. Berryhill & Company requested that Mosell Equities lend Berryhill & Company money, and Berryhill & Company promised to repay the loan.

20. Mosell Equities performed and lent Berryhill & Company money.

21. Berryhill & Company has and continues to refuse to repay the loan.

22. As a direct, proximate and consequential result of Berryhill & Company's breach, Mosell Equities has and continue to suffer damages in the amount of \$405,000.00 plus accumulating statutory interest.

**COUNT THREE - QUASI-CONTRACT – UNJUST ENRICHMENT  
DEFENDANT BERRYHILL & COMPANY**

23. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

24. Mosell Equities provided a benefit to Berryhill & Company by loaning it \$405,000.00.

25. Berryhill & Company accepted the benefit by accepting the loaned funds.

26. Under the circumstances, it is inequitable and unjust for Berryhill & Company to retain the benefit of the \$405,000.00 loan without compensating Mosell Equities for the principle amount of the loan plus accumulating statutory interest.

**COUNT FOUR - CONVERSION  
DEFENDANT BERRYHILL & COMPANY**

27. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

28. Mosell Equities purchased furniture and fixtures with a total value of \$10,532.00 that Berryhill & Company possesses, is using, and refuses either to return to Mosell Equities or to compensate Mosell Equities for these items.

29. Berryhill & Company continued possession of Mosell Equities' property constitutes conversion.

30. As a direct and proximate result of the conduct of Defendant Berryhill & Company, Mosell Equities has suffered damages of \$10,532.00.

**COUNT FIVE - QUASI-CONTRACT – UNJUST ENRICHMENT  
DEFENDANT JOHN BERRYHILL**

31. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

32. Mosell Equities on good faith believes that Defendant John and Amy Berryhill have taken some, if not all of the money Mosell Equities loaned to Defendant Berryhill's company out of Berryhill's company and used that money for their personal benefit.

33. John and Amy Berryhill accepted the benefit of the Mosell Equities' loan by taking the loaned funds out of their business.

34. Under the circumstances, it is inequitable and unjust for John and Amy Berryhill to retain the benefit of some or the entire \$405,000.00 loan without compensating Mosell Equities for all amounts John and Amy Berryhill received, plus accumulating interest.

#### **ATTORNEY FEES**

35. Mosell Equities was forced to hire and retain legal counsel to protect its interests and is therefore entitled to recover according Idaho Code § 12-120(3), and § 12-121, and the Idaho Rules of Civil Procedure, the attorney fees it has expended pursuing recovery from the Defendants.

#### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff prays for judgment against the Defendants as follows:

1. For an Order and Judgment stating that an actual or equitable contract existed between Plaintiff Mosell Equities and Defendant Berryhill & Company, Inc., whereby Mosell Equities loaned a total of FOUR HUNDRED AND FIVE THOUSAND DOLLARS (\$405,000.00), to Defendant Berryhill & Company, Inc., and that Defendant Berryhill & Company, Inc. is in breach of that contract;

2. For and Order and Judgment against Defendant Berryhill & Company for the principal amount of the loans of FOUR HUNDRED AND FIVE THOUSAND DOLLARS (\$405,000.00), plus statutory interest of 12% according to Idaho Code § 28-22-104;

3. For and Order and Judgment against Defendant John and Amy Berryhill for the principal amount of the loans of FOUR HUNDRED AND FIVE THOUSAND DOLLARS (\$405,000.00), or for whatever amounts these Defendants personally benefited from Mosell Equities' loan, plus prejudgment interest allowed by law;

4. For and Order and Judgment against Defendant Berryhill & Company for the value of Mosell Equities' furniture and fixtures of TEN THOUSAND FIVE HUNDRED THIRTY-TWO DOLLARS (\$10,532.00);

5. For an Order and Judgment requiring the Defendants to pay attorney fees and litigation costs to the Plaintiff of not less than \$3,500.00 in the event default is obtained and default judgment is entered, and the actual amount of attorney fees and litigation costs the Plaintiff expends if this matter is contested; and,

6. For such other relief the Court determines is appropriate and proper under the circumstances.

**DEMAND FOR JURY TRIAL**

The Plaintiff requests a jury of not less than 12 members to deliberate on all issues raised in these pleadings.

DATED this 26th day of May 2009.

CLARK & ASSOCIATES, ATTORNEYS



---

Eric R. Clark,  
For the Plaintiff

CHERI C. COPSEY

NO. \_\_\_\_\_  
A.M. 911 FILED P.M. \_\_\_\_\_

MAY 28 2009

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

CV 00 0909974 :  
Case No. \_\_\_\_\_

**SUMMONS**

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF: THE COURT  
MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU  
RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO: BERRYHILL & COMPANY, INC. an Idaho Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as husband and wife.

You are hereby notified that in order to defend this lawsuit, an appropriate written response  
must be filed with the above designated court within 20 days after service of this Summons on  
you. If you fail to so respond the court may enter judgment against you as demanded by the

SUMMONS - 1

000019



plaintiff in the Complaint. A copy of the Complaint is served with this Summons. If you wish to seek the advice of or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected. An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

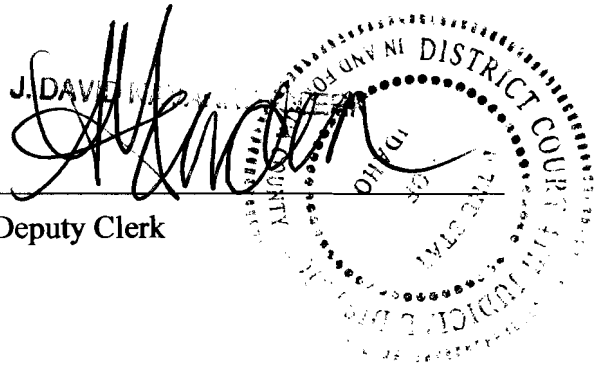
1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above. To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED this 29<sup>th</sup> day of May, 2009.

CLERK OF THE DISTRICT COURT

By

Deputy Clerk



# PEPPER & COMPANY

NO. \_\_\_\_\_ FILED 330  
A.M. \_\_\_\_\_

JUN 08 2009

J. DAVID NAVARRO  
By L. AMES  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

\* \* \* \* \*

MOSELL EQUITIES, AN IDAHO )  
LIMITED LIABILITY COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
BERRYHILL & COMPANY, AN IDAHO )  
CORPORATION, JOHN E. BERRYHILL )  
III, AND AMY BERRYHILL, )  
INDIVIDUALLY, AND AS HUSBAND )  
AND WIFE, )  
Defendant(s). )

CASE NO.CV OC 0909974  
AFFIDAVIT OF SERVICE OF  
THE COPIES CHECKED BELOW:  
☒ SUMMONS  
☒ COMPLAINT & DEMAND  
FOR JURY TRIAL  
☒ PLAINTIFF'S FIRST SET  
OF INTERGATORIES &  
REQUEST FOR PRODUCTION  
OF DOCUMENTS FROM  
DEFENDANTS

ORIGINALS CHECKED BELOW WERE RECEIVED:

☐ SUMMONS  
☐ COMPLAINT  
☐ RESTRAINING ORDER  
☐ RESTRAINING ORDER & ORDER TO SHOW CAUSE  
☐ SUBPOENA  
☐ NOTICE

STATE OF IDAHO }  
 }ss.  
COUNTY OF ADA }

CAT RUSSELL, being first duly sworn on oath deposes and says: That she is a resident of the County of Ada, State of Idaho, that she is over the age of Eighteen years, that she is not a party to the action or related to any of the parties in the above entitled action and that on the 28TH day of MAY 2009, she received the attached:

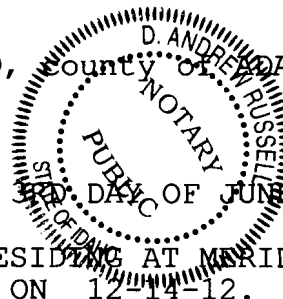
ORIGINALS AND COPIES CHECKED ABOVE WERE DELIVERED UPON:  
BERRYHILL & COMPANY, AN IDAHO CORPORATION, JOHN E. BERRYHILL III,  
AND AMY BERRYHILL INDIVIDUALLY, AND AS HUSBAND AND WIFE

BY SERVING SECRETARY AMY BERRYHILL  
BY DELIVERING TO AND LEAVING WITH: AND AMY BERRYHILL, a person  
over the age of 18 years, residing at 5650 S. SCHOONER WAY, BOISE,  
IDAHO, the usual place of abode of

AT: 5650 S. SCHOONER WAY, BOISE, IDAHO, County of ADA ON: THE 3RD  
day of JUNE 2009, at 7:21 A.M.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 3RD DAY OF JUNE 2009.

NOTARY PUBLIC FOR THE STATE OF IDAHO RESIDING AT MERIDIAN, IDAHO  
WHOSE COMMISSION EXPIRES ON 12-14-12.



**ORIGINAL**

A.M. FILED P.M. *[Signature]*

**JUN 08 2009**

**J. DAVID NAVARRO, Clerk**  
By **E. HOLMES**  
DEPUTY

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
**121 N. 9<sup>th</sup> St., Suite 300**  
**P. O. Box 1776**  
**Boise, ID 83701**  
**Telephone (208) 345-7800**  
**Fax: (208) 345-7894**  
**danw@twplegal.com**

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,**  
**Liability Company,**

**Plaintiff ,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho**  
**corporation, JOHN E. BERRYHILL III and**  
**AMY BERRYHILL, individually, and as**  
**husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**NOTICE OF APPEARANCE**

**Fee: \$58.00**

**TO: CLERK OF THE DISTRICT COURT, PLAINTIFF AND ITS ATTORNEYS**

**YOU ARE HEREBY NOTIFIED** that Daniel E. Williams and the firm of Thomas,  
Williams & Park, LLP, 121 N. 9<sup>th</sup> St., Suite 300, P. O. Box 1776, Boise, Idaho 83701-1776, hereby

NOTICE OF APPEARANCE, P. 1

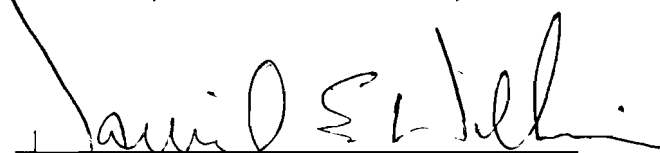
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*am*

enter an appearance as attorneys for record for the above-named defendants, and the Clerk of this Court is hereby requested to make such entries as may be required to record such appearance.

DATED this 8<sup>th</sup> day of June, 2009.

THOMAS, WILLIAMS & PARK, LLP



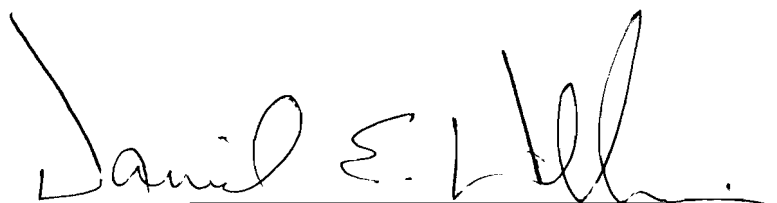
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of June, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail

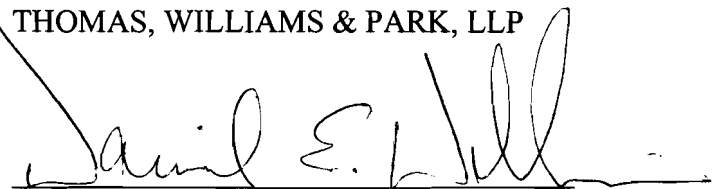


Daniel E. Williams



DATED this 8<sup>th</sup> day of June, 2009.

THOMAS, WILLIAMS & PARK, LLP

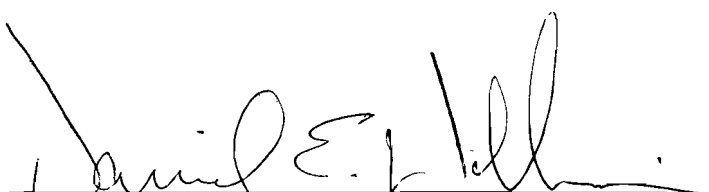
  
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of June, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail

  
Daniel E. Williams

RECEIVED

JUN 08 2009

ORIGINAL

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
danw@twplegal.com

Attorneys for Defendants

NO. \_\_\_\_\_  
A.M. 1:55 FILED \_\_\_\_\_  
P.M. \_\_\_\_\_

JUN 16 2009

J. DAVID NAVARRO, Clerk  
By RIC NELSON  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

ORDER GRANTING MOTION  
FOR DISQUALIFICATION  
OF JUDGE WITHOUT CAUSE

The above-entitled matter having come before the court upon defendants' Motion for  
Disqualification Without Cause and good cause appearing therefor;

ORDER GRANTING MOTION FOR DISQUALIFICATION OF JUDGE  
WITHOUT CAUSE, P. 1

000026

IT IS HEREBY ORDERED that said Motion be and the same is hereby granted. The new District Judge assigned to the above case is \_\_\_\_\_.

DATED this 15<sup>th</sup> day of June, 2009.

Cheri Ceprey  
Judge



Filed Tuesday, June 16, 2009 at 07:58 AM

J. DAVID NAVARRO, CLERK OF THE COURT

BY: 

Deputy Clerk

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES LLC**

Plaintiff,

VS.

**BERRYHILL & COMPANY INC**

**JOHN E BERRYHILL III**

**AMY BERRYHILL**

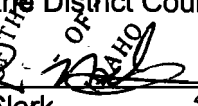
Defendant.

CASE NO. CV-OC-2009-09974

NOTICE OF REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled case has been reassigned to the Honorable **JUDGE DARLA WILLIAMSON**.

Dated this 16th day of June, 2009.

J. David Navarro  
Clerk of the District Court  
By:   
Deputy Clerk

**ANY OTHER HEARINGS CURRENTLY SET WILL HAVE TO BE RESET WITH THE NEWLY ASSIGNED JUDGE!**

**CERTIFICATE OF MAILING**

I hereby certify that on Tuesday, June 16, 2009, I have delivered a true and accurate copy of the foregoing document to the following parties in the method indicated below:

**Daniel Williams**  
Attorney at Law  
PO Box 1776  
121 N 9<sup>th</sup> St Ste 300  
Boise, ID 83701

**Eric Clark**  
Attorney at Law  
PO Box 2504  
Boise, ID 83716

J. DAVID NAVARRO  
Clerk of the Court

By: 

Deputy Clerk

NOTICE OF REASSIGNMENT

000028

**ORIGINAL**

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:12

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
**121 N. 9<sup>th</sup> St., Suite 300**  
**P. O. Box 1776**  
**Boise, ID 83701**  
**Telephone (208) 345-7800**  
**Fax: (208) 345-7894**  
**danw@twplegal.com**

**JUN 30 2009**

**J. DAVID NAVARRO, Clerk**  
**By E. HOLMES**  
**DEPUTY**

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,**  
**Liability Company,**

**Plaintiff ,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho**  
**corporation, JOHN E. BERRYHILL III and**  
**AMY BERRYHILL, individually, and as**  
**husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**DEFENDANTS' MOTION**  
**TO DISMISS**

Defendants Berryhill & Company, Inc., John E. Berryhill III and Amy Berryhill, by and through their attorneys of record, Thomas, Williams & Park, LLP, pursuant to Rule 12(b)(6), I.R.C.P., hereby move the Court for its Order dismissing Plaintiff's Complaint. In support of this motion, Defendants rely on the Memorandum in Support of Motion to Dismiss, filed

**DEFENDANTS' MOTION TO DISMISS, P. 1**

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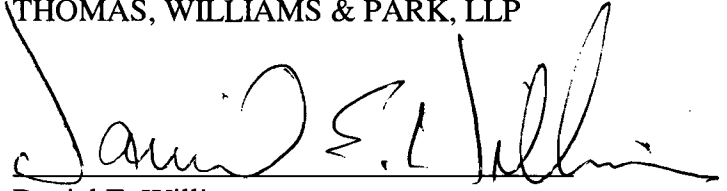
94

concurrently.

Oral argument is requested pursuant to rule 7(b)(3)(C), I.R.C.P.

DATED this 30<sup>th</sup> day of June, 2009.

THOMAS, WILLIAMS & PARK, LLP



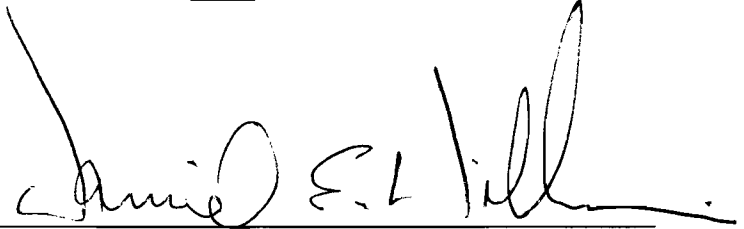
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of June, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail



Daniel E. Williams

**ORIGINAL**

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 452

**JUN 30 2009**

**J. DAVID NAVARRO, Clerk**  
By **E. HOLMES**  
DEPUTY

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
**121 N. 9<sup>th</sup> St., Suite 300**  
**P. O. Box 1776**  
**Boise, ID 83701**  
**Telephone (208) 345-7800**  
**Fax: (208) 345-7894**  
**danw@twplegal.com**

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,**  
**Liability Company,**

**Plaintiff ,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho**  
**corporation, JOHN E. BERRYHILL III and**  
**AMY BERRYHILL, individually, and as**  
**husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**MEMORANDUM IN**  
**SUPPORT OF DEFENDANTS'**  
**MOTION TO DISMISS**

Defendants Berryhill & Company, Inc., John E. Berryhill III and Amy Berryhill, by and  
through their attorney of record, pursuant to Rule 7(b)(3), I.R.C.P., hereby submit this  
Memorandum in Support of Defendants' Motion to Dismiss.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, P. 1

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all

## **INTRODUCTION**

Defendants seek this Court's dismissal of all five counts set forth in the Complaint filed by Mosell Equities, LLC ("Mosell Equities"). Mosell Equities claims that it advanced funds to Berryhill & Company "while Glenn Mosell and John Berryhill were considering establishing a business relationship,"<sup>1</sup> but that such business relationship never was consummated (Complaint: ¶ 7).<sup>2</sup> Plaintiff's allegations and claims are made in such a summary and oblique fashion that, even under the liberal pleading standards of Rule 8(a), I.R.C.P., they fail to state any claim against Defendants. Plaintiff claims a breach a loan agreement, but does not and cannot plead even the most essential of contract elements, leaving the Court nothing to enforce. In short, the Complaint does not, and cannot, identify what was promised, when it was promised, when any agreement was reached. For similar reasons, Plaintiff's equitable claims fail.

Accordingly, dismissal is appropriate because Mosell Equities cannot state a claim for breach of oral contract, breach of an implied-in-fact contract, quasi-contract or conversion.

## **ARGUMENT**

### **1. Plaintiff must plead sufficient matters to give rise to its claims for relief.**

In this case Plaintiff tests the limits of notice pleading. As demonstrated below as to each individual count, Plaintiff relies on the barest, conclusory allegations in an attempt to state both

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<sup>1</sup> Plaintiff's Complaint and Demand for Jury Trial, ¶ 6. Subsequent references to this pleading are cited to "Complaint" by paragraph number.

<sup>2</sup> Defendants maintain that the funds at issue represented Plaintiff's contribution to a speculative endeavor that never materialized involving a development in Owyhee County. By this motion, however, Defendants only seek review under Rule 12(b)(6).

its claims for relief and their basis. Although both the relevant Idaho rule and the federal rule upon which it is based require only a short and plain statement, that statement must nonetheless “show,” not just state, that the pleader is entitled to relief. Rule 8(a)(1), I.R.C.P. Accordingly, mere formulaic incantations of labels and conclusions do not comply with the rule. In *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007), for example, the U.S. Supreme Court ruled:

While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant ‘set out in detail the facts upon which he bases his claim,’ *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (emphasis added), Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (Rule 8(a) ‘contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented’ and does not authorize a pleader’s ‘bare averment that he wants relief and is entitled to it’).

127 S.Ct. at n.3.

Likewise, a court is only bound to take “well-pleaded” factual allegations as true. *Papasan v. Allain*, 478 U.S. 265, 283, 106 S.Ct. 2932, 92 L.Ed.2d 713 (1986) (“we are bound for the purposes of this review to take the well-pleaded factual allegations in the complaint as true”). “A court is not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* at 286; *see also*, *Cedars-Sinai Med. Ctr. V. Nat’l League of Postmaster*, 497 F.3d 972, 975 (9<sup>th</sup> Cir. 2007) (finding a court “do[es] not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations”).

In the present case, Plaintiff does nothing more than make the most generalized claims to relief with little to no factual grounding.

MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS, P. 3

**2. Plaintiff does not state a claim for breach of oral contract.**

**A. No oral agreement is even pled.**

Although Count One is entitled “Breach of an Oral Contract,” Plaintiff does not plead such a contract. In fact, Plaintiff alleges only acceptance of funds on the part of Berryhill & Company and pleads exactly no terms of any purported oral contract. Plaintiff states that it “loaned” money to Berryhill & Company and that Berryhill & Company agreed to repay the funds “by accepting the money” (Complaint: ¶ 14). Obviously, the reference to agreeing to repay by “accepting the money” does not describe an oral agreement, for no such oral agreement can be pled.

Elsewhere, Plaintiff alleges only that Berryhill & Company carried the loans in its financial records as “obligations” to Plaintiff (Complaint: ¶ 10). Plaintiff goes on in Count One to allege, rather beside the point, as follows:

The parties were competent, the contract was for a lawful purpose, there was valid consideration, and the material terms (the contract was for a loan) and tangential terms were either agreed upon by the parties or are established by statute (interest rate) or law (time for performance).

(Complaint: ¶ 14). None of these alleged “terms,” however, can be construed reasonably to constitute an oral contract. It is rather a hornbook recitation of the elements necessary to establish a contract, not the underlying facts of Plaintiff’s claim. Plaintiff cites no agreement of any kind, whether written or oral, capable of performance or enforcement. “If a breach of contract is alleged, the burden is upon the claimant to show ‘the making of the contract, an obligation assumed by defendants, and their breach or failure to meet such obligation.’” *Reynolds*

*v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, 365 (1988), *quoting*, *Thomas v. Cate*, 78 Idaho 29, 31, 296 P.2d 1033, 1035 (1956). Here, Plaintiff has not and cannot even plead or allege the “making of the contract.”

**B. The alleged oral agreement fails for lack of definiteness.**

"[A] contract must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty." *Kohring v. Robertson*, 137 Idaho 94, 99 (Idaho 2002), *quoting* *Giacobbi Square v. PEK Corp.*, 105 Idaho 346, 348, 670 P.2d 51, 53 (1983); *see also*, *Kidd Island Bay Water Users Coop. Ass'n v. Miller*, 136 Idaho 571, 574 (Idaho 2001) (The terms of a contract must be sufficiently definite and certain in order to be enforceable). Here, essential material terms are completely absent, which Plaintiff purports to cure by citing to “statute (interest rate) or law (time for performance)” or that other unspecified material terms were “agreed upon by the parties.” The law does not imply a generic time for performance for every kind of contract. Moreover, there is no indication whatsoever as to the term of the alleged “loan,” whether it was a demand note, or what any purported payment schedule would look like; none of the material terms are pled that one expects to find with a *bona fide* loan.

For these reasons, Plaintiff does not and cannot plead the requisite definiteness of necessary terms to give rise to an oral contract.

**3. Plaintiff does not state a claim for breach of an implied-in-fact contract.**

Idaho law recognizes three types of contractual relationships, all alleged by Plaintiff in this case:



First is the express contract wherein the parties expressly agree regarding a transaction. Secondly, there is the implied in fact contract wherein there is no express agreement, but the conduct of the parties implies an agreement from which an obligation in contract exists. The third category is called an implied in law contract, or quasi contract. However, a contract implied in law is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent or the agreement of the parties and, in some cases, in spite of an agreement between the parties. It is a non-contractual obligation that is to be treated procedurally as if it were a contract, and is often referred (sic) to as quasi contract, unjust enrichment, implied in law contract or restitution.

*Continental Forest Products, Inc. v. Chandler Supply Co.*, 95 Idaho 739, 743, 518 P.2d 1201, 1205 (1974).

The implied-in-fact contract is then further described in *Fox v. Mt. W. Elec.*, 137 Idaho 703 (2002):

‘An implied in fact contract is defined as one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other often being inferred from the circumstances attending the performance.’ *Farnworth v. Femling*, 125 Idaho 283, 287, 869 P.2d 1378, 1382 (1994) (citing *Clements v. Jungert*, 90 Idaho 143, 153, 408 P.2d 810, 815 (1965)). The implied-in-fact contract is grounded in the parties’ agreement and tacit understanding. *Kennedy v. Forest*, 129 Idaho 584, 587, 930 P.2d 1026, 1029 (1997). ‘The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other’s request and that the requesting party promised payment, then the court may find a contract implied in fact.’ *Homes by Bell-Hi, Inc. v. Wood*, 110 Idaho 319, 321, 715 P.2d 989, 991 (1986) (citing *Clements v. Jungert*, 90 Idaho 143, 153, 408 P.2d 810, 815 (1965); *Bastian v. Gafford*, 98 Idaho 324, 325, 563 P.2d 48, 49 (1977)).

Idaho Code § 28-1-205(1) defines ‘course of dealing’ as ‘a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.’

137 Idaho at 708. As this reference makes clear, although the implied-in-fact contract is a separate category from an express contract, it nevertheless “is grounded in” the parties’

agreement and tacit understanding. Accordingly, in order give rise to an actual claim, the parties' agreement and tacit understanding must be pled with sufficient detail to give rise to the implied-in-fact agreement.

Plaintiff fails to plead anything that would lead the Court to be able to conclude that an implied-in-fact agreement arose. As the "course of dealing" reference in *Fox* suggests, a plaintiff must do more than make bald, conclusory allegations such as that at Count Two that Berryhill & Company requested that Plaintiff lend money and promised to repay (Complaint: ¶ 19).<sup>3</sup> Although the Court must accept as true all properly pleaded facts in deciding a motion to dismiss, Plaintiff's complaint sets forth no facts giving rise to a course of dealing that would state a claim for an implied-in-fact contract or its breach.

**4. Plaintiff does not state a claim for quasi-contract or unjust enrichment.**

According to the Idaho Supreme Court,

in order to establish the prima facie case for unjust enrichment, the plaintiff must show that there was: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof.

*King v. Lang*, 136 Idaho 905, 910 (Idaho 2002), *citing*, *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88, 982 P.2d 917, 923 (1999), *citing*, *Curtis v. Becker*, 130 Idaho 378, 382, 941 P.2d 350, 354 (Ct. App. 1997). Here, again, there is an utter failure to plead anything remotely suggesting that it would be inequitable for Defendants to retain the benefit alleged.

---

<sup>3</sup> Notably, these allegations appear nowhere in Plaintiff's section entitled "Facts and Allegations," ¶¶'s 5-12.

Not every benefit provided by a party, especially viewed in isolation, amounts to unjust enrichment. *See, e.g., Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001) (“An action for unjust enrichment does not lie simply because one party benefits from the efforts of others; instead, ‘it must be shown that a party was unjustly enriched in the sense that the term ‘unjustly’ could mean illegally or unlawfully”) (citation omitted). Plaintiff cites nothing in its complaint that provides any foundation for its claim of unjust enrichment.

**5. Plaintiff does not state a claim for conversion.**

At Count Four of Plaintiff’s Complaint appears a claim for conversion, which states that Plaintiff purchased furniture and fixtures with a total value of \$10,532. Plaintiff fails again, however, to provide any factual predicate for this claim. Not every possession constitutes conversion. *See, e.g., Priel v. Heby*, 2004 NY Slip Op 50820U, 5 (N.Y. Sup. Ct. 2004) (“To properly plead a cause of action for conversion, it is incumbent upon plaintiff to allege facts establishing that he owned or had a superior right to the materials in question, that he demanded their return, and that defendant refused to deliver them. . . . ‘A conversion action cannot be predicated on an equitable interest or a mere breach of a contractual obligation’) (citations omitted) (emphasis added). Even under Rule 8(a), it is not sufficient simply to make conclusory claims entirely without a factual basis. *See, e.g., Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 343-44 (2d Cir. 2006) (“we stop well short of saying that Plaintiffs bear no burden at the pleading stage,” because they must allege “those facts *necessary* to a finding of liability”).

Here, Plaintiff makes no effort to identify the claimed furniture and fixtures, to claim ownership, to state how that ownership arose, nor to do anything other than make conclusory claims to relief.

6. **Plaintiff fails to state a claim for unjust enrichment against John and Amy Berryhill individually.**

Corporate officers, directors and members are generally immune from individual liability for corporate acts. Plaintiff identifies the individual Defendants John and Amy Berryhill as the President and Secretary respectively of Defendant Berryhill & Company, Inc. (Complaint: ¶ 2). Idaho law provides that directors and officers of a corporation are not liable for debts, obligations or liabilities of the corporation. I.C. § 30-1-831. Personal liability cannot be imposed without piercing the corporate veil. *VFP VC v. Dakota Co.*, 141 Idaho 604, 613 (2005). As the Court explained,

To warrant casting aside the legal fiction of distinct corporate existence. . . it must. . . be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person has ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice.

141 Idaho at 713 (*citing Hayhurst v. Boyd*, 50 Idaho 752, 761 (1931)). A complaint that fails to allege any particulars about the conduct of corporate officers and members cannot state a claim for piercing the corporate veil. *Barlow's, Inc., v. Bannock Cleaning Corp.*, 103 Idaho 310, 315 (Ct. App. 1982).

In this case, Plaintiff has alleged no justification for disregarding the corporate existence of Berryhill & Company, Inc., and imposing personal liability on John and/or Amy Berryhill. Plaintiff has not even attempted to allege a cause of action for piercing the corporate veil. Instead, Plaintiff makes only the vaguest reference to its belief that John and Amy Berryhill have taken money allegedly loaned by Plaintiff out of Berryhill & Company, Inc. (Complaint: ¶ 32). The corporate veil cannot be disregarded so easily.

Accordingly, this Court must dismiss Count Five against John and Amy Berryhill individually.

**CONCLUSION**

For all the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's complaint in its entirety.

DATED this 30<sup>th</sup> day of June, 2009.

THOMAS, WILLIAMS & PARK, LLP



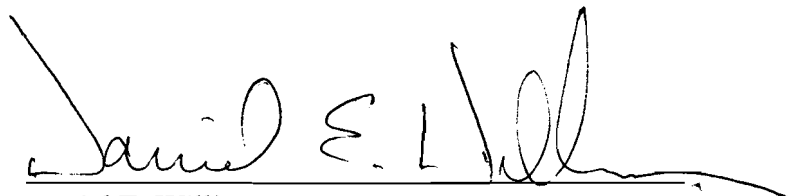
Daniel E. Williams  
Attorney for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of June, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail



Daniel E. Williams

DANIEL E. WILLIAMS (ISB 3920)  
 THOMAS, WILLIAMS & PARK, LLP  
 121 N. 9<sup>th</sup> St., Suite 300  
 P. O. Box 1776  
 Boise, ID 83701  
 Telephone (208) 345-7800  
 Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

NO. \_\_\_\_\_  
 A.M. \_\_\_\_\_ FILED P.M. 152

JUN 30 2009

J. DAVID NAVARRO, Clerk  
 By E. HOLMES  
 DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
 Liability Company,  
  
 Plaintiff ,  
  
 vs.  
  
 BERRYHILL & COMPANY, INC., an Idaho  
 corporation, JOHN E. BERRYHILL III and  
 AMY BERRYHILL, individually, and as  
 husband and wife,  
  
 Defendants.

Case No. CV OC 0909974  
 DEFENDANTS' MOTION  
 FOR PROTECTIVE ORDER

The above-named Defendants, by and through their counsel of record, Daniel E. Williams of Thomas, Williams & Park, LLP, hereby move the Court for a protective order pursuant to Rule 26(c) of the Idaho Rules of Civil Procedure. For the reasons stated in the Memorandum in Support, filed herewith, this Court should extend the time in which Defendants have to respond

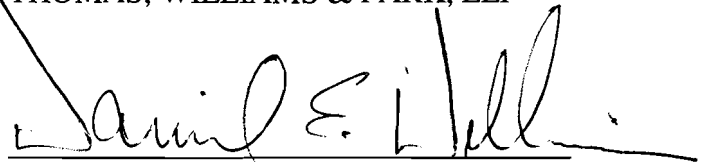
DEFENDANTS' MOTION FOR PROTECTIVE ORDER, P. 1

all

to Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Defendants until after Defendants' Motion to Dismiss, filed concurrently, has been decided. Plaintiffs further rely on the Affidavit of Daniel E. Williams Re: Motion for Protective Order, filed concurrently.

DATED this 30<sup>th</sup> day of June, 2009.

THOMAS, WILLIAMS & PARK, LLP



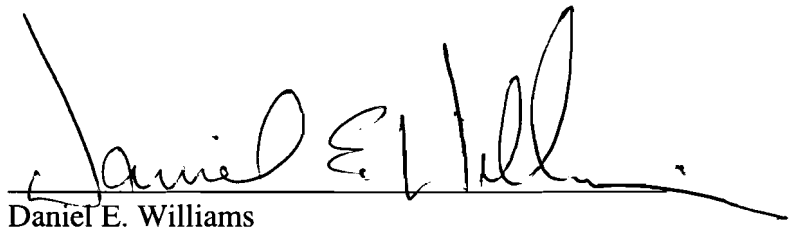
Daniel E. Williams  
Attorney for Defendants

#### CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of June, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail



Daniel E. Williams

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
**121 N. 9<sup>th</sup> St., Suite 300**  
**P. O. Box 1776**  
**Boise, ID 83701**  
**Telephone (208) 345-7800**  
**Fax: (208) 345-7894**  
**[danw@twplegal.com](mailto:danw@twplegal.com)**

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 1152

**JUN 30 2009**

**J. DAVID NAVARRO, Clerk**  
By **E. HOLMES**  
DEPUTY

### Attorneys for Defendants

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,  
Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho corporation, JOHN E. BERRYHILL III and AMY BERRYHILL, individually, and as husband and wife.**

### Defendants.

**Case No. CV OC 0909974**

**AFFIDAVIT OF DANIEL E. WILLIAMS RE: MOTION FOR PROTECTIVE ORDER**

STATE OF IDAHO )  
 )ss.  
County of Ada )

**DANIEL E. WILLIAMS**, being first duly sworn on oath, deposes and says:

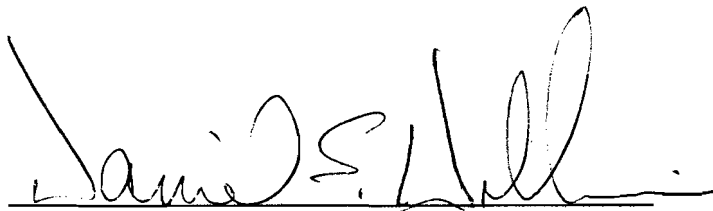
1. He is one of the attorneys for Defendants in the above-captioned matter.

**AFFIDAVIT OF DANIEL E. WILLIAMS RE: MOTION FOR PROTECTIVE ORDER, P. 1**

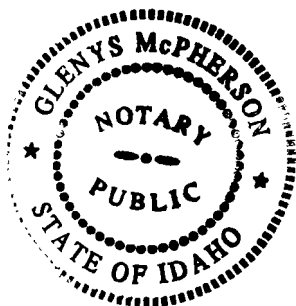
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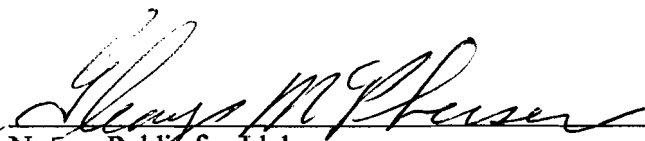


2. Attached as Exhibit A is a true and correct copy of Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Defendants.

  
Daniel E. Williams

Subscribed and sworn to before me this 30<sup>th</sup> day of June, 2009.



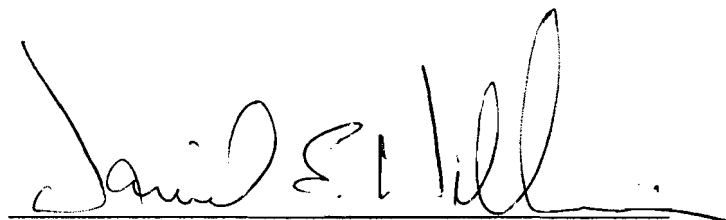
  
Notary Public for Idaho  
Residing at Boise, Idaho  
My Commission Expires: 11-7-13

#### CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of June, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail

  
Daniel E. Williams

# EXHIBIT A

COPY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CVOC 0909974

**PLAINTIFF 'S FIRST SET OF  
INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS TO DEFENDANTS**

TO: BERRYHILL & COMPANY, INC., JOHN E. BERRYHILL III and AMY BERRYHILL:

The Plaintiff, pursuant to Rules 33 and 34 of the Idaho Rules of Civil Procedure, hereby requests that the Defendants answer and serve written responses, under oath, to the following Interrogatories and Requests for Production of Documents within thirty (30) days from the date of service of these discovery requests.

**PRELIMINARY STATEMENT**

A. When responding to the following Interrogatories and Requests for Production, you are requested to furnish all information available to you, including information in the possession of

PLAINTIFF 'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF  
DOCUMENTS TO DEFENDANTS- 1

000046

your attorneys, investigators, employees, agents, representatives, or any other person or persons acting on your behalf, and not merely such information as is known by you on personal knowledge.

B. If you cannot answer any of the following Interrogatories in full after exercising due diligence to secure the information to do so, so state and answer to the extent possible, specifying your inability to answer the remainder, and stating whatever information or knowledge you have concerning the unanswered portions.

C. Each Interrogatory and Request for Production is intended to and does request that each and every, all and singular, and the particulars and parts thereof, be answered with the same force and effect as if each part and particular were the subject of and were asked by a separate Interrogatory or Request for Production.

D. These Interrogatories are deemed continuing and your Answers thereto are to be supplemented, as additional information and knowledge becomes available or known to you.

E. Plaintiff hereby requests that you serve Answers to these Interrogatories within thirty (30) days of the date of service hereof. Plaintiff further requests that you serve Responses to these Requests for Production of Documents and produce each of the documents requested, or in the alternative provide copies of the documents requested, at the offices of Clark & Associates, Attorneys, 776 E. Riverside Drive, Ste. 200, Eagle, Idaho 83616, within thirty (30) days of the date of the service hereof.

F. All of the Requests for Production herein are deemed continuing. If, after responding to these Requests, you acquire any document requested herein, or any information related to any document requested herein which is not reflected by any documents produced or any response to these requests for production, you must file a supplemental response or indicate to counsel for Plaintiff of the existence of such documents. Such supplementation is requested herein in addition to any supplementation required by the Idaho Rules of Civil Procedure.

G. If any document or portion thereof, which is responsive to any request herein, is or will be withheld from production, inspection, or copying, please fully identify such document or portion thereof in your response and fully state in your response the reason it is or will be withheld. In addition, if any document is practically impossible of production, inspection, or copying, please fully identify such document and the reason for the practical impossibility.

#### DEFINITIONS

As used throughout these Interrogatories and Requests for Production:

1. The term "documents" shall mean and include any and all:
  - (a) Tangible things or items, whether handwritten, typed, printed, tape recorded, electronically recorded, videotape recorded, visually reproduced, stenographically reproduced, or reproduced in any other manner;

- (b) Originals and all copies of any and all communications;
- (c) Writings of any kind or type whatsoever;
- (d) Books and pamphlets;
- (e) Microtape, microfilm, photographs, movies, records, recordings, tape recordings, computer disks, and videotape recordings, stenographically or otherwise reproduced;
- (f) Diaries and appointment books;
- (g) Cables, wires, memoranda, reports, notes, minutes, and interoffice communications;
- (h) Letters and correspondence;
- (i) Drawings, blueprints, sketches, and charts;
- (j) Contracts or agreements;
- (k) Other legal instruments or official documents;
- (l) Published material of any kind;
- (m) Vouchers, receipts, invoices, bills, orders, billings, and checks;
- (n) Investigation or incident reports;
- (o) Files and records;
- (p) Notes or summaries of conferences, meetings, discussions, interviews, or telephone conversations or messages;
- (q) Drafts or draft copies of any of the above.

2. The term "identify" when referring to an individual, corporation, or other entity, shall mean to set forth:

- (a) The name;
- (b) Present or last known address;
- (c) Telephone number;
- (d) If a corporation, the principal place of business.

3. The term "identify" when referring to a conversation means to state with respect to that conversation the date, the participants, the place, and the substance of the conversation.

4. The term "identify" when referring to a document shall mean to set forth:

- (a) The name of the document;
- (b) The contents of the document;
- (c) The author of the document;
- (d) The date of the document;
- (e) The document's present location and the name of its custodian.
- (f) The nature and substance of the document with sufficient particularity to enable it to be subpoenaed;
- (g) Whether it will be voluntarily made available for inspection and copying.

In lieu of the identification required by subparts (a) through (f) above, you may attach a legible copy of the document to your answers to these interrogatories if your answer to the particular interrogatory and subpart thereof: (i) is sufficient to enable a reader thereof

to determine which document or documents are referred to by your answer, and (ii) contains all information requested by subparts (a) through (f) above not contained in the document itself.

5. The term "you" and "your" means Defendants, BERRYHILL & COMPANY, INC., JOHN E. BERRYHILL and AMY BERRYHILL, and all or any of your agents, representatives, employees, attorneys, and every person acting or purporting to act, or who has ever acted or purported to act on your behalf. "You" means also the person or persons responding to these requests and "your" refers to the same persons to which "you" refers. If the Plaintiff intends to refer to a specific Defendant or Defendants in a particular request, the Plaintiff will identify that party.

6. "Tangible things" means any object, property, or thing of a corporeal nature which is not otherwise subsumed and included under the term "documents" as hereinabove defined.

7. "Persons" means and includes any natural person, partnership, corporation, joint venture, unincorporated association, governmental entity (or agency or board thereof), quasi-public entity or other form of entity, and any combinations thereof.

8. "Basis of your opinion" refers to your answer to an interrogatory and means a complete statement setting forth the following:

- (a) Each and every fact or matter claimed to be a fact in chronological order which supports or tends to support your answer to an interrogatory;
- (b) The name or other means of identification, present telephone number, and present address of each person who knows or claims to know any such fact or matter claimed to be a fact and the substance of such facts or matters claimed to be a fact which are known or claimed to be known to such person; and
- (c) A complete description of any tangible or physical evidence of any kind which supports or tends to support your answer to an interrogatory together with the name or other means of identification, the present telephone number, and the present address of each person who has custody or possession of the original and of each copy of such original.

Masculine pronouns shall not connote any particular gender but shall be taken to mean masculine, feminine, or neuter gender, as the appropriate case may be. All requests for documents assume that the documents are either in your possession or control as the terms "you" and "your" are defined.

## **INTERROGATORIES**

**INTERROGATORY NO. 1:** Please identify the date and the amount of any funds you (any Defendant) received from Mosell Equities.

**INTERROGATORY NO. 2:** Please identify by name, and provide a current address and telephone number for each bookkeeper, accountant, or accounting firm that Defendant BERRYHILL & COMPANY, INC. has used or employed for the last five (5) years.

**INTERROGATORY NO. 3:** Please identify by name, and provide a current address and telephone number for each bookkeeper, accountant, or accounting firm that Defendants JOHN E. BERRYHILL III and AMY BERRYHILL have used or employed for the last five (5) years.

**INTERROGATORY NO. 4:** Attached as Exhibit 1 is a letter from Attorney Daniel E. Williams in which Mr. Williams represents "... the relevant funds constituted an investment by Mosell Equities, LLC, in a speculative venture dealing with the proposed development of Polo Cove near Sunnyslope in canyon County, Idaho." Please identify all facts and documents which you assert supports the contention that Mosell Equities' money you received was an "investment" in the Polo Cove project.

**INTERROGATORY NO. 5:** Referring to the question propounded in the previous interrogatory, provide a complete and detailed accounting of your use of Mosell Equities' money - all \$405,000.00.

**INTERROGATORY NO. 6:** Referring to the question propounded in Interrogatory No. 4, what happened to Mosell Equities' money after you received it but before you claim you used it for the Polo Cove project? If the money was deposited in any account in a bank or financial institution, please identify the bank or financial institution by name and address, and identify the dates and amounts of any deposits or withdrawals concerning these funds.

**INTERROGATORY NO. 7:** Referring again to Exhibit 1, and to Mr. Williams' contention as identified in Interrogatory No. 4, please state whether or not the Berryhill & Co. Restaurant currently located in downtown Boise, Idaho, was part of the Polo Cove project.

**INTERROGATORY NO. 8:** If you answered the previous interrogatory affirmatively, please identify all facts and documents which you claim supports this contention.

**INTERROGATORY NO. 9:** Referring again to Exhibit 1, Mr. Williams claims, "Over the next many months, Mr. Berryhill devoted substantial time to working on the project, meeting with architects, designers, potential vendors, vintners, hotel developers, as well as other interested parties." Please identify the particular person(s) or firm, and the date, time and location of all Mr. Berryhill's meetings with each:

1. Architect
2. Designer
3. Potential Vendors

4. Vitners
5. Hotel Developers
6. and any other "interested parties."

INTERROGATORY NO. 10: If you contend you paid for any costs, invoices or bills associated with or directly for the "Polo Cove project," please identify the date of the payment, the amount of the payment, the purpose of the payment and the source of the payment funds.

INTERROGATORY NO. 11: Referring again to Exhibit 1, Mr. Williams claims, "A good portion of the funds identified in your letter were dedicated to this buildout." Please identify the total amount of Mosell Equity funds that you "dedicated" to the buildout of the new restaurant. Of these Mosell Equity funds which you dedicated for the buildout, please state the date of the payment, the amount of the payment and identify the payee by individual or business name and provide that individual's or businesses' address providing the material, labor or fixtures for the buildout.

INTERROGATORY NO. 12: Please identify Mosell Equities' ownership interest in Berryhill & Co. Restaurant or in any entity you claim owns this restaurant.

INTERROGATORY NO. 13: Referring again to Exhibit 1, Mr. Williams claims, "Potential investors and other interested parties were wine and dine by Mr. Mosell at the restaurant without charge." Please identify the dates and times for these meetings or dinners and state the costs for the drinks and food that you claim Mr. Mosell and his parties consumed.

INTERROGATORY NO. 14: Referring again to Exhibit 1, Mr. Williams claims, "Part of the funds that Mr. Mosell is now seeking repayment was for attorney fees arising out of this case." Please identify the date, the payee, and the amount of the payment of all attorney fees referenced by Mr. Williams that you made.

INTERROGATORY NO. 15: Referring again to Exhibit 1, Mr. Williams claims, "Over many months of discussions, it was agreed that there would be a joint venture to develop Polo Cove with Mr. Mosell as the 'money' man and Mr. Berryhill as a day-to-day operations man." Please identify what Mr. Berryhill understood would be his responsibilities as a "day-to-day operations man" for the Polo Cove project.

INTERROGATORY NO. 16: Referring to your answer to the previous interrogatory, please identify the education and experience you (John Berryhill) have for the responsibilities listed.

INTERROGATORY NO. 17: Did Defendant John Berryhill receive any money for "consulting" fees from any person or entity associated with the Polo Cove project? If so, state the date, the amount of payment and identify the source of payment.

INTERROGATORY NO. 18: Referring again to Exhibit 1, Mr. Williams claims, "Others involved in Polo Cove started asking Mr. Berryhill about Mr. Mosell, saying he would not return their calls and they had not been paid for their work." Please identify the "others" by name, address and phone number, and state the date and time of the conversation.



INTERROGATORY NO. 19: State the name, address and telephone number of each person you intend to call as a witness at the trial of this matter. With regard to each witness, state the substance of the facts to which you expect the witness to testify.

INTERROGATORY NO. 20: State the name and address of each person whom you expect to call as an expert witness at the trial. According to Rule 26(b)(4), IRCP, and for each such person:

- a) State the subject matter on which the expert is expected to testify;
- b) Provide a complete statement of all opinions to be expressed and the basis and reasons therefore;
- c) Identify the data or other information considered by the witness in forming the opinions;
- d) Provide any exhibits to be used as a summary of or support for the opinions;
- e) Identify any qualifications of the witness, including a list of all publications or documents authored by the witness within the preceding ten years;
- f) Disclose the compensation to be paid for the testimony; and,
- g) List any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

INTERROGATORY NO. 21: Do you intend to introduce any documentary evidence at the trial of this matter? If so, describe each document or exhibit you intend to introduce.

INTERROGATORY NO. 22. Please identify any legal or factual basis for any affirmative defense raised in any responsive pleading.

### **REQUEST FOR PRODUCTION OF DOCUMENTS**

REQUEST NO. 1: Please produce all documents in your possession which you claim establish the money you received from Mosell Equities was not a loan, but an "investment" in the Polo Cove project.

REQUEST NO. 2: Please produce copies of bank or financial institution records memorializing the dates and amounts of any deposits or withdrawals you made regarding Mosell Equities' funds.

REQUEST NO. 3: Please produce all documents which you claim supports your contention that Berryhill & Co. Restaurant currently located in downtown Boise, Idaho, was part of the Polo Cove project.

REQUEST NO. 4: Regarding your response to Interrogatory No. 9, please provide all documents to support your contention John Berrhyll "devoted substantial time working on the [Polo Cove] project."

REQUEST NO. 5: Regarding your response to Interrogatory No. 10, please provide copies of all costs, invoices or bills associated with or directly for the Polo Cove project. If you paid these costs, invoices, or bills, please provide evidence proving payment, including copies of checks.

REQUEST NO. 6: Regarding your response to Interrogatory No. 11, please provide copies of all documents relating to the costs for the buildout for the restaurant.

REQUEST NO. 7: Please provide any documents that you claim in any manner support your response to Interrogatory No. 13.

REQUEST NO. 8: Please provide any documents that you claim in any manner evidence payments you made for any legal services regarding the Polo Cover Project or any other litigation you claim involved Glenn Mosell, Mosell Equities and any of the Defendants as parties.

REQUEST NO. 9: Please provide any documents that you claim in any manner support your response to Interrogatory No. 15.

REQUEST NO. 10: Please provide any documents that you claim in any manner support your response to Interrogatory No. 17.

REQUEST NO. 11: Please produce all exhibits that you may utilize at any trial or hearing in this matter.

REQUEST NO. 12: Please produce a copy of the current Berryhill & Company lease, the Letter of Intent Mr. Williams identifies in Exhibit 1, and any other documents you contend establish the terms of the current Berryhill & Company lease.

DATED this 28th day of May, 2009.

CLARK & ASSOCIATES, ATTORNEYS



---

Eric R. Clark  
For the Plaintiff



THOMAS, WILLIAMS  
& PARK

April 2, 2009

VIA TELEFAX: 938-9504 & U.S. MAIL

Paul R. Mangiantini  
Mangiantini & Sloniak, LLP  
1191 E. Iron Eagle Dr., Suite 200  
Eagle, Idaho 83616

RE: Glenn Mosell

Dear Paul:

I'm writing in response to your letter of February 20, 2009. There are a number of inaccuracies and mischaracterizations in that correspondence, which I will respond to for you.

First and foremost, the funds described in your letter and claimed by Mr. Mosell or Mosell Equities, LLC, did not constitute a loan to John Berryhill or Berryhill & Co., Inc. ("Berryhills" or "Berryhill & Co."). I believe you will find no note, no security terms, no repayment terms, no interest rate, nor any of the other specific terms necessary in order to sustain the concrete requisites of a *bona fide* loan. Rather, despite the parties' inability to come to terms on any particular written contractual relationship, you will find that the extensive course of dealing indicates that the relevant funds constituted an investment by Mosell Equities, LLC, in a speculative venture dealing with the proposed development of Polo Cove near Sunnyslope in Canyon County, Idaho.

Apparently, Mr. Mosell is a developer and was interested in pursuing the Polo Cove project. He first contacted John Berryhill in approximately July of 2005 to ask him if he would put a restaurant in the development. Over many months of discussions, it was agreed that there would be a joint venture to develop Polo Cove with Mr. Mosell as the "money" man and Mr. Berryhill as a day-to-day operations man. Over the next many months, Mr. Berryhill devoted substantial time to working on the project, meeting with architects, designers, potential vendors, vintners, hotel developers, as well as other interested parties. Mr. Mosell constantly assured Mr. Berryhill that he would "take care of" Mr. Berryhill and that they would get "everything in writing". The roughly three years worth of emails and other documents in the possession of your client substantiate the enormous amount of time Mr. Berryhill devoted to this venture, for which he was not paid.

April 2, 2009  
Page 2

At that time, Berryhill & Co. operated a restaurant at the Broadway Park Shopping Center in Boise. As part of the Polo Cove venture, Mr. Mosell eventually insisted that Mr. Berryhill move the restaurant to downtown to a site that would impress people he wanted to interest in Polo Cove, in addition to planning a new restaurant at the Polo Cove site. Mr. Mosell wanted to "splash the pot." Mr. Berryhill made it very clear that the move was too big a financial step for him to take on himself. Mr. Mosell represented that he was not going anywhere, that together they had "big things" to do. Throughout the construction of the new Berryhills restaurant Mr. Mosell told Mr. Berryhill not to "cheap out," not to worry about the cost of the buildout, "go big," "do it sexy." A good portion of the funds identified in your letter were dedicated to this buildout.

Potential investors and other interested parties were wine and dined by Mr. Mosell at the restaurant without charge. Mr. Mosell signed a letter of intent with Tomlinson & Associates for additional space on the ground floor of the same downtown building near the restaurant for a Polo Cove showroom, although Mr. Berryhill advised him it was too big. Mr. Berryhill told Mr. Mosell that this addition would considerably increase their liabilities. Mr. Mosell responded that Mr. Berryhill was not looking at "the big picture." Mr. Mosell could use the space for Polo Cove promotions in the day and Berryhills could use it for banquet and reception facilities in the evening. Mr. Mosell ordered expensive furniture for the space and Berryhills had to cover the remaining half of the cost of this furniture upon delivery. Berryhills is still being charged rent for this additional space.

Mr. Mosell began paying his rent for the promotional area at later and later times each month and had not paid for Polo Cove's portion of the buildout. Then the Polo Cove meetings stopped. Potential investors stopped coming to the restaurant. Others involved in Polo Cove started asking Mr. Berryhill about Mr. Mosell, saying he would not return their calls and they had not been paid for their work. The funds identified in your letter included some amounts paid to attorneys to draft contracts between Berryhill & Co., Inc., and Mosell Equities, LLC, which were not executed. It is my understanding that an amount owed to attorney Kim Gourley is still unpaid.

You will also note that earlier Kim Gourley started out representing both Mosell Equities, LLC, and Mr. Berryhill as co-buyers in a lawsuit arising from a Purchase and Sale Agreement relating to the Broadway Park Shopping Center, where Berryhills then was located (Mr. Gourley was later replaced). At Mr. Mosell's urging, litigation was initiated, which was unsuccessful. Part of the funds that Mr. Mosell is now seeking repayment was for attorney fees arising out of this case.

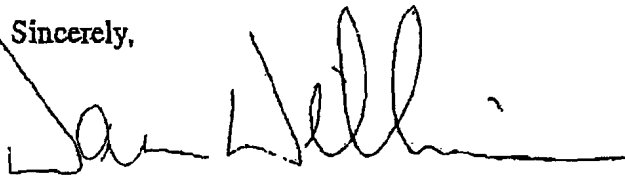
April 2, 2009  
Page 3

Although it is true that certain documents reference "loans" by either Glen Mosell or Mosell Equities, Inc., you will find that the "loan" label was attached because of instructions from Mr. Mosell himself to Berryhills' bookkeeper without Mr. Berryhill's involvement. As such, they represent nothing more than a label that Mr. Mosell unilaterally applied to the funds.

If we calculate the additional costs for which Mr. Berryhill is responsible, including increased rent, buildout of additional space, as well as the enormous contribution of time expended by Mr. Berryhill in the Polo Cove venture, the Berryhills contribution exceeds that identified by Mr. Mosell. Moreover, without Mr. Mosell's inducements into the Polo Cove venture, Berryhills would still be operating at Broadway with much reduced expenses and attendant risk. Because of Mr. Mosell's inducements and representations, Berryhills is responsible for much greater operating expenses in a very challenging environment for restaurants.

In short, Mr. Mosell is now asking John Berryhill or Berryhill & Co. to refund a good part of his speculative investment in Polo Cove, as if Berryhills was a guarantor of that investment. Based on the course of dealing between the parties, it is clear that Berryhills was no such guarantor or borrower. We believe that, after an exhaustive review of the course of dealing involved here over three years, a jury will find that there were no "loans." Accordingly, we must decline your client's invitation to reimburse him for his own investment in this failed venture.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dan Williams", with a long horizontal flourish extending to the right.

Daniel E. Williams

DEW:g

ORIGINAL

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED \_\_\_\_\_ P.M. 452

JUN 30 2009

J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
Liability Company,

Plaintiff ,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

)  
) Case No. CV OC 0909974  
)

) DEFENDANTS' MEMORANDUM  
) IN SUPPORT OF MOTION  
) FOR PROTECTIVE ORDER  
)

Defendants Berryhill & Company, Inc., John E. Berryhill III and Amy Berryhill, by and  
through their counsel of record, hereby submit their Memorandum in Support of Motion for  
Protective Order.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR  
PROTECTIVE ORDER, P. 1

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## INTRODUCTION

Together with service of its Complaint, Plaintiff Mosell Equities, Inc., served Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Defendants ("Plaintiff's First Discovery"). Plaintiff's First Discovery contains twenty-two interrogatories, not counting subparts, and twelve requests for production concerning every aspect of Plaintiff's theories of liability and Defendants' defenses to those claims.<sup>1</sup> Defendants submit that they should not be required to answer and respond to Plaintiff's First Discovery until the Court has had an opportunity to consider and rule upon Defendants' Motion to Dismiss, filed concurrently.

## ARGUMENT

This Court has "broad, inherent powers to control discovery." *Edmunds v. Kramer*, 142 Idaho 867, 877-78 (2006), *citing*, *Bailey v. Sanford*, 139 Idaho 744, 749 (2004). The Idaho Supreme Court has observed that discovery rules

are subject to the injunction in Rule 1 that they be 'construed to secure the just, speedy, and inexpensive determination of every action.' To this end, the requirement of Rule 26(b)(1) that material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery where 'justice requires (protection for) a party or person from. . . undue burden or expense. . .' With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.'

*Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 101 Idaho 795, 800-01 (1980), *quoting*, *Herbert v. Lando*, 441 U.S. 153, 176 (1979).

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<sup>1</sup> Plaintiff's First Discovery is attached to the Affidavit of Daniel E. Williams Re: Motion for Protective Order, filed concurrently.



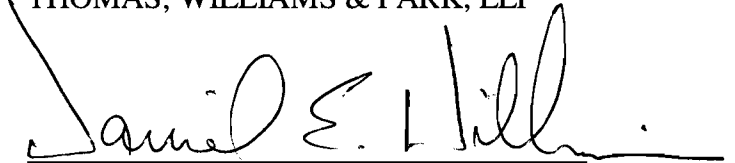
Thus, before a defendant is required to expend significant time and resources providing discovery responses, that defendant should have the opportunity to seek the Court's decision on a motion to dismiss, particularly when the plaintiff's complaint is so fraught with problems. This focused discovery management would fairly balance the rights of both parties by deferring potentially unnecessary time and expense devoted to wide-ranging discovery until the Court has determined what, if any, part of Plaintiff's complaint is actionable. This discovery management would fully comply with the Court's charge to ensure that a determination to this proceeding is obtained in a speedy and inexpensive manner, while still allowing full discovery on all issues when justified.

#### CONCLUSION

For all the foregoing reasons, Defendants respectfully request this Court to grant Defendant's Motion for Protective Order.

DATED this 30<sup>th</sup> day of June, 2009.

THOMAS, WILLIAMS & PARK, LLP

A handwritten signature in black ink, appearing to read "Daniel E. Williams", written over a horizontal line.

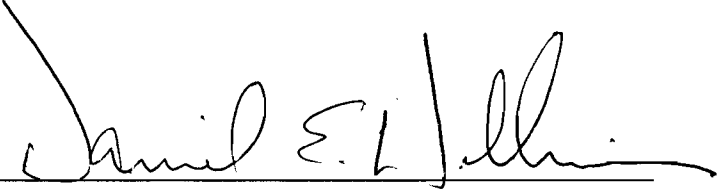
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of June, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail

  
\_\_\_\_\_  
Daniel E. Williams

JUL. 6. 2009 2:54PM

NO. 6885- -P. 2 - - -

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:26

**JUL 6 2009**

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
**121 N. 9<sup>th</sup> St., Suite 300**  
**P. O. Box 1776**  
**Boise, ID 83701**  
**Telephone (208) 345-7800**  
**Fax: (208) 345-7894**  
**danw@twplegal.com**

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,**  
**Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho**  
**corporation, JOHN E. BERRYHILL III and**  
**AMY BERRYHILL, individually, and as**  
**husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**NOTICE OF HEARING ON**  
**DEFENDANTS' MOTION TO**  
**DISMISS AND MOTION FOR**  
**PROTECTIVE ORDER**

**TO: PLAINTIFF AND ITS ATTORNEYS OF RECORD**

Defendants Berryhill & Company, Inc., John E. Berryhill III and Amy Berryhill, by and  
through their attorneys of record, Thomas, Williams & Park, LLP, pursuant to Rule 12(b)(6),

**NOTICE OF HEARING ON DEFENDANTS' MOTION TO DISMISS AND MOTION**  
**FOR PROTECTIVE ORDER, P. 1**

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I.R.C.P., will bring on for hearing before this Court on the 22nd day of July, 2009, at 2:45 p.m.,  
their Motion to Dismiss and Motion for Protective Order.

DATED this 6<sup>th</sup> day of July, 2009.

THOMAS, WILLIAMS & PARK, LLP



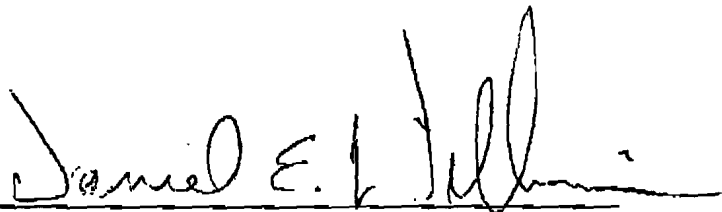
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 6<sup>th</sup> day of July, 2009, a true and correct copy of the foregoing  
instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☐ Via U.S. Mail



Daniel E. Williams

NOTICE OF HEARING ON DEFENDANTS' MOTION TO DISMISS AND MOTION  
FOR PROTECTIVE ORDER, P. 2

FILED 1233  
JUL 10 2009  
J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**PLAINTIFF'S RESPONSE TO  
DEFENDANTS' MOTION TO  
DISMISS AND  
PLAINTIFF'S RESPONSE TO  
DEFENDANTS' MOTION FOR  
PROTECTIVE ORDER**

Judge Williamson

\*\*\*\*\*

COMES NOW the Plaintiff Mosell Equities, LLC and hereby responds to the  
Defendants' motion to dismiss. The Court should deny the Defendants' motion as the  
Defendants base their entire argument on a federal case law heightened pleading standard that  
does not apply in Idaho or to this case. Additionally, although this is a motion to dismiss

pursuant to Rule 12(b)(6), IRCP, the Defendants fail to cite to a single case addressing a pleadings standard for the Plaintiff's claims. This motion is without basis in law or fact and the Court should deny it in its entirety.

### **ARGUMENT - MOTION TO DISMISS**

#### **I. THE DEFENDANTS FAIL TO ARGUE THE APPROPRIATE STANDARD FOR A MOTION TO DISMISS.**

Rule 8 of the Idaho Rules of Civil Procedure controls this motion.

Rule 8(a)(1). General rules of pleading - Claims for relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third-party claim, shall contain (1) if the court be of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 8(e)(1). Pleading to be concise and direct - Consistency.

Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

Rule 8(f). Construction of pleadings.

All pleadings shall be so construed as to do substantial justice.

Recently, the Idaho Supreme Court in *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156 (2005) restated the standard this Court must apply when deciding a motion to dismiss brought under Rule 12(b)(6), IRCP. This pleading standard is minimal as all Idaho law requires is *notice* pleading.

The district court dismissed the complaint pursuant to I.R.C.P. 12(b)(6). A motion to dismiss for failure to state a claim should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975). When reviewing a district court's dismissal of a case under I.R.C.P. 12(b)(6), this Court draws all reasonable inferences in favor of the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). After drawing all inferences in favor of the non-moving party, the Court then examines whether a claim for relief has been stated. *Id.*

In certain circumstances, as those stated in Rule 9, IRCP and designated selectively by the Appellate Courts, a heightened pleading standard may be applicable. However, as no such situation arises here, the very minimal Rule 8 standard applies, and upon review, this Court must construe the Plaintiff's pleadings accordingly.

While the motion to dismiss standard is well established in Idaho, unaccountably, the Defendants ignore this standard and argue throughout their memorandum that a higher standard applies in this case. The Defendants argue that *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) requires a heightened pleadings standard here in Idaho, but *Twombly* was a Sherman Anti-Trust Act case and has been applied throughout the Federal circuits, including the Ninth Circuit, only in such cases. *Twombly* does not apply *carte blanc* to all motions to dismiss as the Defendants would hope, but has been limited in scope to specific circumstances, none of which applies here. The other federal-level cases the Defendants cite are equally inapplicable to Idaho. While these cases may be used to persuade the Court that a different standard *should* apply, the Defendants argue this heightened standard as if it were the law in Idaho – which it clearly is not.

Additionally, the Defendants fail to cite to an Idaho case to support their contention that *Twombly* or any other cases they cite applies because no Idaho appellate Court has adopted the *Twombly* standard in Idaho – for any situation. Notwithstanding the Defendants' ridicule of the Plaintiff's pleadings, they begin their motion to dismiss by citing law that is inapplicable to Idaho as a jurisdiction and to any of the claims raised in Plaintiff's pleading. In other words, the Defendants' entire motion is premised on the erroneous argument that some sort of heightened pleading standard applies, when however, no such standard exists in Idaho. Contrary to the

Defendants' arguments, this Court must apply the liberal and minimal pleading requirements of Rule 8 as interpreted and applied by Idaho Appellate Courts.

## **II. THE PLAINTIFF HAS PROPERLY PLED A CLAIM FOR BREACH OF AN ORAL CONTRACT.**

Somewhat ironically, although the Defendants argue the court should apply their *Twombly* standard when interpreting the Plaintiff's pleadings, the very first case they subsequently cite actually contains the appropriate standard of review under Rule 8(a), IRCP. The Defendants cite to *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, 766 P.2d 1243 (1988), quote from that case, and assert the quoted language establishes a rule of law applicable to pleadings. In other words, the Defendants assert the quoted language applies to a standard applicable when considering a Rule 12(b) motion. Actually, when the *Reynolds* Court states "If a breach on contract is alleged, the burden is upon the claimant to show 'the making of the contract, an obligation assumed by defendants, and their breach or failure to meet such obligation'," the Court is identifying and addressing the Plaintiff's burden AT TRIAL, not in the Plaintiff's initial pleading as the Defendants misrepresent.

In fact, the *Reynolds* Court rules, as this Court should, the Plaintiff's pleadings were sufficient based on the appropriate interpretation of Rule 8(a), IRCP.

The *Reynolds*' complaint provides enough information to the court to satisfy I.R.C.P. 8(e)(1), which merely requires that a "simple, concise, and direct statement" be plead. Although the pleading is not at the apex of clarity, the court is allowed to draw all plain inferences from the facts plead when determining the question of sufficiency. *Nielson v. Bd. of Directors*, 63 Idaho 108, 118, 117 P.2d 472 (1941). We find the *Reynolds*' pleading sufficient to state a claim and to notify the defendant of plaintiff's contentions.

*Reynolds v. American Hardware Mut. Ins. Co.*, 766 P.2d at 1245.

Mosell Equities clearly indicates to the Defendants that the Plaintiff has alleged an oral contract exists; "Mosell Equities loaned money to Berryhill & Company and Berryhill &



Company agreed to repay the debt by accepting the money. (Complaint, p. 3, para. 14.) Mosell equities has therefore satisfied the minimal pleading requirements of Rule 8.

### **III. THE PLAINTIFF IS NOT REQUIRED TO *PLEAD* EACH ELEMENT OF A CONTRACT WITH “DEFINITENESS.”**

Once again, the Defendants have bypassed the pleadings stages of the case and have gone right to the trial. The Court will note that the Defendants fail to cite a single case in support of their argument that the Plaintiff’s pleadings lack the requisite “definiteness,” or to any case that establishes a plaintiff must *plead* each *term* of a contract.

*Kohring v. Robertson*, 137 Idaho 94, 44 P.Ed 1149 (2002). This case involves the interpretation and enforcement of oral settlement negotiations and has nothing to do with a *pleading* standard.

*Giacobbi Square v. PEK Corp.*, 105 Idaho 346, 670 P.2d 51 (1983). This case involves the review of a summary judgment decision and has nothing to do with a *pleading* standard.

*Kidd Island Bay Water Users Cooperative Association, Inc. v. Miller*, 136 Idaho 571, 38 P.3d 609 (2001). This case too has nothing to do with establishing a heightened *pleading* standard, but somewhat ironically, does establish that the law will provide a legal rate of interest when the parties have not memorialized that term in a written or oral contract. Essentially, this case is the antithesis of an argument for lack of contract definiteness – if the contract is silent, then a court can look to the law for this term.

Mosell Equities pled it loaned an exact amount of money to the Defendants, that the Defendants agreed to repay the money, the law (Idaho Code § 28-22-104) will provide the interest rate if the parties have not, and the trier of fact<sup>1</sup> will establish a reasonable time for repayment, if the parties also were silent on that term.

---

<sup>1</sup> IDJI 6.14.1 - Time for performance of a contract

#### **INSTRUCTION NO. \_\_\_\_**

Where a contract does not specify a time for performance, the law will imply a requirement that it be performed within a reasonable time, as is determined by the subject matter of the contract, the situation of the parties, and the nature of the performance required. In such case, it is for the jury to determine what a reasonable time would be under the circumstances, given all of the evidence in the case.

#### **IV. THE PLAINTIFF HAS PROPERLY PLED AN IMPLIED-IN-FACT CONTRACT.**

Once again, the cases the Defendants cite in support of this argument do not address a pleading standard, but a proof at trial standard. Nevertheless, even assuming that Mosell Equities is required to plead each element of an implied-in-fact contract, it is clear that Mosell Equities has satisfied this requirement.

IDJI 6.07.1- Equitable theories - implied in facts contract

#### **INSTRUCTION NO. \_\_\_\_**

An implied-in-fact contract is a contract where the terms and existence of the contract are demonstrated by the conduct of the parties, with the request of one party and the performance by the other often being inferred from the circumstances attending the performance. To find an implied-in-fact contract, the facts must be such that the intent of the parties to make a contract can be inferred from their conduct. An implied-in-fact contract is given the same legal effect as any other contract.

To establish an implied-in-fact contract, the plaintiff has the burden of proof on each of the following propositions:

1. The circumstances imply a request by the defendant for performance by plaintiff; and
2. The circumstances imply a promise by the defendant to compensate the plaintiff for such performance; and
3. The plaintiff performed as requested.

Mosell Equities pled that the Defendants requested a loan and they promised to repay, and that Mosell Equities lent the Defendants money who did not repay as promised. (Complaint, p. 4, paras. 18-22.) As the Defendants quoted from *Fox v. Mt. W. Electric*, 137 Idaho 703, 52 P.3d 848 (2002), "The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact." *Fox v. Mt. W. Electric*, 137 Idaho at 708. Considering that all Mosell had to state in its pleadings was "a short and plain statement

of the claim showing that the pleader is entitled to relief,” and upon reviewing the pleadings, “A court may normally grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only ‘when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief’,” it is hard to imagine the Defendants’ claim has any basis in law, fact or logic.

**V. THE PLAINTIFF HAS PROPERLY PLED A QUASI CONTRACT AND UNJUST ENRICHMENT.**

The Defendants cite to *King v. Lang*, 136 Idaho 905, 42 P.3d 905 (2002), and correctly note that Supreme Court once again articulated the elements of a “prima facie case for unjust enrichment.” However, *King* was decided at summary judgment, not through a motion to dismiss under Rule 12. As with each of the other cases the Defendants cite, this case is irrelevant and provides no support for a heightened pleading standard – it does not even address the sufficiency of the pleadings in the opinion. Moreover, it is clear from the pleadings that Mosell Equities has satisfactorily pled the elements of this cause of action. As stated above, Mosell Equities “conferred a benefit” by loaning money to the Defendants, that the Defendants “appreciated some benefit” from the loan, and it would clearly be “inequitable” for the Defendant to keep the money and not repay Mosell Equities.

**VI. THE PLAINTIFF HAS PROPERLY PLED A CLAIM FOR CONVERSION.**

It appears the Defendants’ problem with the Mosell Equities’ pleading under this claim is that the Plaintiff did not specifically identify each item of furniture and each fixture to which the Plaintiff was claiming ownership, so the Defendants’ contend the Plaintiff has failed to state a claim for conversion. The relevant pleadings are contained in paragraphs 27 – 30 of the Complaint.

27. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.
28. Mosell Equities purchased furniture and fixtures with a total value of \$10,532.00 that Berryhill & Company possesses, is using, and refuses either to return to Mosell Equities or to compensate Mosell Equities for these items.
29. Berryhill & Company continued possession of Mosell Equities' property constitutes conversion.
30. As a direct and proximate result of the conduct of Defendant Berryhill & Company, Mosell Equities has suffered damages of \$10,532.00.

Mosell Equities claims it purchases furniture and fixtures, (claim of ownership - identification), with a total value of a sum certain (identification), that the Defendants possess, use, and refuse to return to Mosell Equities (wrongful possession and refusal to return). Clearly the Plaintiff has met its limited burden to plead a claim of conversion. If the Defendants are unclear about just what furniture and fixtures to which Mosell Equities is referring, they can pursue that inquiry through discovery. There is simply no pleading standard in Idaho that requires an aggrieved party to identify each specific piece of property in a pleading when pursuing a claim for conversion.

**VII. THE PLAINTIFF HAS PROPERLY PLED A CLAIM FOR UNJUST ENRICHMENT AGAINST JOHN AND AMY BERRYHILL INDIVIDUALLY.**

As stated above, when construing Mosell Equities' pleadings, the Court must deny the Defendants' motion to dismiss, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Additionally, the Court must draw all reasonable inferences in Mosell Equities' favor. Mosell Equities pled it made loans to Berryhill & Company and that the Berryhills took corporate property (this loaned money) out of

the corporation and used it for their own purposes. Mosell Equities also pled that it was inequitable and unjust for the Berryhills to personally retain the benefit of the loan Mosell Equities made to the corporation. (Complaint p. 5-6, paras. 31 – 34)

In *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 165 P.3d 261 (2007), the Idaho Supreme Court reversed the trial court because the court had improperly instructed the jury during trial regarding the theory of piercing the corporate veil. The Supreme Court stated there are two bases for piercing the corporate veil; “fraudulent transfer” under Idaho Code § 55-913(1), occurs when shareholders, officers or directors fraudulently transfer corporate property out of the corporation for their own use or to someone else without proper compensation to the corporation. The Court also discussed the “alter ego” theory applicable to disregard the corporate status. “In order for a corporation to be an alter ego of an individual, there must be (1) a unity of interest and ownership to a degree that the separate personalities of the corporation and individual no longer exist and (2) if the acts are treated as acts of the corporation an inequitable result would follow.” *Vanderford Co., Inc. v. Knudson*, 165 P.3d 270-271. Both theories apply to this case.

The reasonable inferences to which Mosell Equities is entitled from its allegations are as follows:

1. The Berryhills transferred corporate assets out of the corporation without adequate compensation, so the transfer of these assets was fraudulent.
2. The Berryhill’s corporation was merely the Berryhills’ alter ego; they were the sole shareholders, the only directors and officers, and they exerted sufficient control and authority over the corporation to remove corporate assets at their leisure and whim.

3. If the Berryhills were allowed to keep this money and personally benefit and hide behind their corporation, an inequitable result would surely follow.

Again, the Defendants fail to cite to a case establishing a *pleading* standard, although it appears the Defendants are asserting they have. The Defendants claim, “A complaint that fails to allege any particulars about the conduct of corporate officers and members cannot state a claim for piercing the corporate veil,” and cite specifically to *Barlow’s, Inc., v. Bannock Cleaning Corp.*, 103 Idaho 310, 315 (Ct. App. 1982). The Defendants cite to a particular page in the *Barlow’s* opinion, so they appear to be quoting from that opinion. However, once again the cases cited in Defendants’ argument have nothing to do with a pleading standard. *Barlow’s* was decided at summary judgment, when the Plaintiff relied on its bare pleadings and did not respond to affidavits stating facts contrary to the Plaintiff’s claims. If the Court of Appeals actually stated the quoted language cited by the Defendants on page 315 of the opinion as the Defendants represent to the Court, then the Defendants should be able to point to the language at oral argument – because it does not appear to exist in Mosell Equities’ copy of the case.

While unquestionably Mosell Equities did not specifically state it was attempting to pierce the corporate veil, not only is that intent clearly evidenced from its allegations, the Defendants have cited no cases that require a plaintiff to specify in its pleadings it intends to pierce the corporate veil. It is enough to name a defendant individually, claim that individual is associated with the entity, claim that the individual removed corporate assets without authority, and claim that it would be unjust to allow such conduct. Mosell Equities identified the Berryhills as corporate offices and claimed they withdrew money from the corporation for their own benefit. Those allegations provide a basis to reasonably infer that Mosell Equities is entitled to

pierce the corporate veil and pursue the Berryhills individually under both the “fraudulent transfer” and “alter ego” theories.

### **VIII. THE DEFENDANTS SHOULD BE SANCTIONED FOR FILING THEIR FRIVOLOUS MOTION TO DISMISS.**

Rule 11(a)(1) entails certification that:

Every pleading, motion, and other paper [filed with the court is] to the best of the signer's knowledge, information, and belief after reasonable inquiry ... well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I.R.C.P. 11(a)(1)(2004)(emphasis added); *Riggins v. Smith*, 126 Idaho 1017, 1021, 895 P.2d 1210, 1214 (1995). Pursuant to Rule 11(a)(1), "pleadings, motions, and other papers signed by an attorney or a party must meet certain criteria, and failure to meet such criteria will result in the imposition of sanctions." *Slack*, 140 Idaho at 39-40, 89 P.3d at 879-80 (citing *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990)). The intent of the rule is to grant courts the power to impose sanctions for discrete pleading abuses or other types of litigative misconduct. *Kent v. Pence*, 116 Idaho 22, 23, 773 P.2d 290, 291 (Ct.App.1989).

*Campbell v. Kildew*, 141 Idaho 640, 650, 115 P.3d 731 (2005).

While it is clear there is no Idaho law that establishes a heightened pleading standard to any of Mosell Equities' claims, the Defendants' argue their entire motion as if such standard existed. Moreover, not a single case the Defendants cite refers to a pleading standard, but they present a motion to dismiss on the pleadings, and argue these cases apply. Consequently, the motion is not “well grounded in fact” or “warranted by existing law.” Equally, if not more disturbing, the Defendants have misstated the facts of the cases they cite, and in at least one example (*Barlow's, Inc., v. Bannock Cleaning Corp*) may have actually misrepresented the actual language. Consequently, the Plaintiff seeks attorney fees against the Defendants. Such a waste of the Court's and the Plaintiff's time should not go unpunished.

### **ARGUMENT - MOTION FOR PROTECTIVE ORDER**

As argued above, upon close scrutiny of the Defendants' motion to dismiss, that motion has no basis in law or fact, and it appears the Defendants filed that motion to delay the proceedings and to increase the cost of litigation to the Plaintiff. It also appears the Defendants have similar intent by filing this motion for protective order. Because there is no legal or factual basis on which to grant the Defendants' motion to dismiss, and the Defendants base their argument for a protection order on the validity of their motion to dismiss, the Court should deny the Defendants' motion for protective order and require the Defendants to immediately reply to the requested discovery.

### **CONCLUSION**

The Plaintiff respectfully requests the Court deny the Defendants' motions to dismiss and for protective order and to require the Defendants to pay the Plaintiff's attorney fees incurred defending these frivolous and baseless motions.

DATED this 10th day of July, 2009.

CLARK & ASSOCIATES, ATTORNEYS



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Eric R. Clark  
For the Plaintiff



### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 10th day of July, 2009, I served the foregoing, by having a true and complete copy delivered via US Mail, postage prepaid, and addressed to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



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ERIC R. CLARK

**ORIGINAL**

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. **4:10**

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
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**JUL 20 2009**

**J. DAVID NAVARRO, Clerk**  
**By KATHY J. BIEHL**  
**DEPUTY**

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,**  
**Liability Company,**

**Plaintiff ,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho**  
**corporation, JOHN E. BERRYHILL III and**  
**AMY BERRYHILL, individually, and as**  
**husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**DEFENDANTS' REPLY**  
**IN SUPPORT OF**  
**MOTION TO DISMISS**

Defendants Berryhill & Company, Inc. ("Berryhill & Company"), John E. Berryhill III  
and Amy Berryhill, by and through their attorney of record, pursuant to Rule 7(b)(3), I.R.C.P.,  
hereby submit their Reply In Support of Defendants' Motion to Dismiss.

**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS, P. 1**

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## **INTRODUCTION**

The exaggerated tone adopted by Plaintiff in Plaintiff's Response to Defendants' Motion to Dismiss<sup>1</sup> suggests exactly why Defendants' motion to dismiss is well taken. Defiance is simply no substitute for well-pled allegations. Plaintiff fails even to plead the barest factual predicate for its generalized claims for relief. Viewed objectively, Plaintiff's complaint does not meet the most minimal standards of notice pleading, despite Plaintiff's repeated attempts to invoke such standards.

## **ARGUMENT**

### **1. Rule 8(a) requires a minimal "showing," not just an unsupported claim.**

Plaintiff first takes issue with Defendants' inclusion of federal authority in their discussion of Rule 8(a), I.R.C.P. (Plaintiff's Response: 2-4). Here, Plaintiff ignores not just the plain language of Rule 8(a), but also the fact that Rule 8(a) is based upon the nearly identical federal rule. Rule 8(a), I.R.C.P., states that a pleading "shall contain" a short and plain statement "showing that the pleader is entitled to relief" (emphasis added). The federal cases cited by Defendants demonstrate that the choice of the word "showing," rather than another word such as "stating," has significant consequences.

Furthermore, it is clear that Idaho looks to the federal courts in interpreting the similar, or in some cases identical, federal rules. *See, e.g., Compton v. Compton*, 101 Idaho 328, 334 n.1, 612 P.2d 1175, 1181 n. 1 (1980) ("We will therefore look to rulings on the scope of the federal rule for guidance in interpreting the [identical] Idaho rule"); *accord, Herrera v. Estay*, 2009 Ida.

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<sup>1</sup> *See, e.g.,* p. 7 ("... it is hard to imagine the Defendants' claim has any basis in law, fact or logic."). Subsequent references to this pleading are cited to "Plaintiff's Response" by page number.

LEXIS 11, \*7, 209 P.3d 647, 651 (2009) (construing Rules 12(b)(4) & (5)); *Martin v. Hoblit*, 133 Idaho 372, 376 n.3, 987 P.2d 284, 288 n.3 (1999) (considering I.R.C.P. 4(a)(2)); *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 395-96, 405 P.2d 634, 637-38 (1965) (considering I.R.C.P. 65(a) and I.R.C.P. 52(a)).

While Plaintiff is correct that the *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), dealt specifically with a Sherman Act anti-trust case, the language cited by Defendants was not itself limited to such cases. Moreover, the U.S. Supreme Court relied upon commentary that was not limited to that one topic, but applicable generally:

While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant ‘set out in detail the facts upon which he bases his claim,’ *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (emphasis added), Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (Rule 8(a) ‘contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented’ and does not authorize a pleader’s ‘bare averment that he wants relief and is entitled to it’).

127 S.Ct. at n.3. Simply put, Plaintiff’s complaint consistently fails even to allege the “statement of circumstances, occurrences, and events in support of the claim presented.” Rather, it simply consists of a “bare averment that [Plaintiff] wants relief and is entitled to it.”

**2. Plaintiff fails to plead any oral contract.**

Plaintiff’s discussion of its claim of an oral contract makes this failure quite clear. At no point does Plaintiff engage Defendants’ principal argument – that it failed even to plead an

agreement to repay.<sup>2</sup> Instead, Plaintiff repeats its insufficient allegation that Defendant Berryhill & Company agreed to repay the debt “by accepting the money” (Plaintiff’s Response: 4-5). Berryhill & Company did not enter into any oral agreement “by accepting the money.” What is obviously lacking are any facts supporting an allegation of an oral agreement to repay whatsoever.

**3. Plaintiff fails to state a claim for breach of an implied-in-fact contract.**

Here, again, Plaintiff’s complaint clearly does not accomplish what Plaintiff claims it does. *Fox v. Mt. W. Electric*, 137 Idaho 703, 52 P.3d 848 (2002), which is discussed by both Plaintiff and Defendants, indicates that where the conduct of the parties gives rise to two distinct inferences that (1) one performed at the other’s request and (2) that the requesting party promised payment, then the court may find a contract implied in fact. Aside from the merest incantation of the fact that Plaintiff is entitled to relief, Plaintiff utterly fails to plead under (2) either that Berryhill & Company promised payment or that any conduct actually pled would allow the inference that Berryhill & Company promised payment. Reliant as it is on a “course of conduct,” the theory of implied-in-fact contract requires at least some minimal showing of entitlement to relief under this theory.

**4. Similarly, Plaintiff fails to state a claim for quasi contract or unjust enrichment.**

In response to Defendants’ objections, Plaintiff states that the authority relied upon by Defendants in describing a prima facie case, *King v. Lang*, 136 Idaho 905, 42 P.3d 905 (2002), was “decided at summary judgment, not through a motion to dismiss under Rule 12” (Plaintiff’s

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<sup>2</sup> Defendants maintain that Plaintiff’s failure is unavoidable, because of the lack of any such agreement, oral or otherwise, to repay.

Response: 7). Defendants concede this point. It does not alter, however, the argument actually made earlier by Defendants. Here, again, there is an utter failure to plead anything remotely suggesting that it would be inequitable for Defendants to retain the benefit alleged, as *King's* description of a prima facie case requires. Likewise, there is no indication from Plaintiff's pleading that Defendants have retained any enrichment that is unjust, illegal or unlawful. Again, there is a complete failure to show, rather than merely state.

**5. Plaintiff does not state a claim for conversion.**

In response to Defendants' arguments regarding Plaintiff's lack of factual predicate for a claim of conversion, Plaintiff repeats its allegations and insists they are adequate (Plaintiff's Response: 7-8). In so doing, Plaintiff ignores Defendants' point that not every possession constitutes conversion. Plaintiff must at least allege and make a minimal showing that it owned or had a superior interest to the furniture and fixtures claimed and some minimal indication of what property is alleged to be at stake. Plaintiff has done none of these.

**6. Plaintiff fails to state a claim for unjust enrichment against John and Amy Berryhill.**

Plaintiff's argument is particularly weak regarding its purported claims against John and Amy Berryhill individually. Plaintiff argues that the following bare allegations give rise to the most far-fetched inferences allowing Plaintiff to pierce the corporate veil and make John and Amy Berryhill individually liable to Plaintiff:

- 1) Plaintiff "on good faith believes" that Defendants John and Amy Berryhill have taken "some, if not all of the money" loaned to Berryhill & Company out of it and used it for their personal benefit (Complaint ¶ 32);

- 2) John and Amy Berryhill “accepted the benefit” of the loan “by taking the loaned funds out of “their” business (Complaint ¶ 33);<sup>3</sup>
- 3) Under “the circumstances,” it is inequitable and unjust for them to retain the benefit (Complaint ¶ 34).

Such allegations fail to meet the pleading standard for piercing the corporate veil.

As Defendants noted previously,

To warrant casting aside the legal fiction of distinct corporate existence. . . it must. . . be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person has ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice.

*Maroun v. Wyreless Sys.*,<sup>4</sup> 141 Idaho 604, 613 (citing *Hayhurst v. Boyd*, 50 Idaho 752, 761

(1931). The Idaho Supreme Court went on to state explicitly: “Merely being a director or officer of a corporation is not sufficient to pierce the corporate veil.” *Ibid*. If being a director or officer is insufficient, then the mere allegation that John and Amy Berryhill are officers is insufficient, without more, even at the pleading stage.

Plaintiff takes exception to Defendants’ characterization of *Barlow’s, Inc., v. Bannock Cleaning Corp.*, 103 Idaho 310, 315 (Ct. App. 1982). Yet the Court of Appeals in *Barlow’s* went to great pains to explain that corporate status could not be disregarded so easily and casually as Plaintiff’s attempts to do in its Complaint:

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<sup>3</sup> Defendants note that the filings available to Plaintiff at the Office of the Secretary of State for Idaho demonstrate that individual Defendant John Berryhill is also the sole shareholder of Berryhill & Company. The Court may take judicial notice of this fact without converting this motion to one for summary judgment.

<sup>4</sup> In their Memorandum in Support of Defendants’ Motion to Dismiss, p. 9, Defendants cited correctly to this language, but referred to the wrong case name.

As a general rule, officers and directors of a corporation are not personally liable on corporate contracts. E. g., *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 588 P.2d 939 (1978). The separate existence of a validly formed corporation will be recognized unless it is shown that the corporate veil should be pierced to avoid unjust consequences inconsistent with the corporate concept. H. Henn, *Law of Corporations* § 146 (1970); *Surety Life Insurance Co. v. Rose Chapel Mortuary, Inc.*, 95 Idaho 599, 514 P.2d 594 (1973).

103 Idaho at 314-15. The latter case cited by the Court of Appeals, *Surety Life Insurance Co. V. Rose Chapel Mortuary, Inc.*, 95 Idaho 599 (1973), makes clear that, as in *Maroun, supra*, in order to pierce the corporate veil, there must be (1) such a unity of interest and ownership that the individuality of such corporation and such person has ceased; and (2) it must further appear from the facts that, under the circumstances, observation of the corporate form would sanction a fraud or promote injustice. 95 Idaho at 601. Plaintiff pleads nothing with regard to these elements.

If Plaintiff's view of its pleading burden regarding piercing the corporate veil were accepted, it is difficult to conceive of an alleged creditor who could not force individual officers or shareholders to defend themselves before this Court simply upon allegations that the creditor had loaned money, the individuals had obtained some benefit from it and, without explanation, it would be "inequitable" for them to retain it.

Finally, Plaintiff makes a dubious claim for Rule 11 sanctions against Defendants for "such a waste of the Court's and the Plaintiff's time," referring to the current motion to dismiss (Plaintiff's Response: 11). Defendants urge that, if anyone deserves sanction, it is Plaintiff for forcing John and Amy Berryhill to defend themselves individually upon such a clearly inadequate basis. *See, e.g., Durrant v. Quality First Mktg.*, 127 Idaho 558, 561 (Idaho Ct. App. 1995) ("Indeed, had Durrant brought suit to pierce the corporate veil in the first action, he might well have been in violation of the requirement in I.R.C.P. 11 that a pleading be well-grounded in



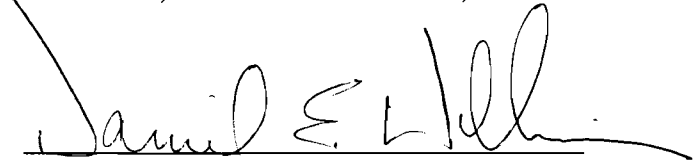
fact and warranted in law. Under the standards set forth in Rule 11, mere 'suspicion,' 'without factual foundation' is not a sufficient basis to sue an individual. *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990), citing *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986)").

### **CONCLUSION**

For all the foregoing reasons, Defendants respectfully request that their motion to dismiss be granted in all respects.

DATED this 20<sup>th</sup> day of July, 2009.

THOMAS, WILLIAMS & PARK, LLP

A handwritten signature in black ink, appearing to read "Daniel E. Williams", written over a horizontal line.


Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 20<sup>th</sup> day of July, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☐ Via U.S. Mail

  
\_\_\_\_\_  
Daniel E. Williams

JUL 28 2009

J. DAVID NAYARRO, Clerk  
By [Signature]  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Case No. CV OC 0909974

MEMORANDUM DECISION  
AND ORDER ON DEFENDANT'S  
MOTION TO DISMISS

Before the court for decision is the Defendants Motion to Dismiss pursuant to Rule 12(b) (6). Hearing was held on July 22, 2009. Attorney Eric Clark appeared on behalf of plaintiff and Attorney Dan Williams appeared on behalf of defendants.

**FACTS AND PROCEDURAL BACKGROUND**

On May 28, 2009, Mosell Equities (Plaintiff) filed a Complaint against Berryhill & Company, John E. Berryhill III, and Amy Berryhill (collectively Defendants) alleging breach of an oral contract, breach of an implied-in-fact contract, quasi-contract—unjust enrichment, and conversion. These allegations are based on the assertions that Mosell Equities made various loans to Berryhill & Company totaling \$405,000 and that Berryhill & Company has not repaid any of this money even though it has been demanded.

On July 1, 2009, Defendants filed a Motion to Dismiss pursuant to Idaho Rule of Civil Procedure 12(b) (6). Defendants argue that the pleadings fail to state a claim upon which relief can be granted even under the liberal pleading standard of Idaho Rule of Civil Procedure 8(a) because Plaintiffs have pled insufficient facts. Based on *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and other federal cases, Defendants argue that the pleader must shown entitlement to

relief and that Plaintiff has failed to do this because the Complaint contains generalized claims with no factual grounding.

In response, Plaintiff rejects any application of *Twombly* or other federal case law and argues that Idaho only requires notice pleading. Plaintiff then argues that it has properly pled each of its cause of actions.

### LEGAL STANDARD

A motion to dismiss for failure to state a claim upon which relief may be granted may only be granted under Idaho Rule of Civil Procedure 12(b)(6) where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 200 (2005) (quoting *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975)). The court must draw all reasonable inferences in favor of the non-moving party and must determine whether the nonmoving party has stated a claim for relief and alleged all of the essential elements of the claim presented. *Id.*; *Johnson v. Boundary School District 101*, 138 Idaho 331, 334, 63 P.3d 457, 500 (2003). Pursuant to Idaho’s notice pleading system, the complaint needs to contain “a concise statement of the facts constituting the cause of action and a demand for relief.” *Partout v. Harper*, 145 Idaho 683, 686, 183 P.3d 771, 774 (2008); Idaho R. Civ. P. 8(a).<sup>1</sup>

The purpose of the complaint is “to inform the defendant of the material facts upon which the plaintiff bases his action.” *Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993, 995 (1986). The pleader is not required to prove the factual allegations until trial. *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, 365, 766 P.2d 1243, 1246 (1988).

### ANALYSIS

In this case, the Complaint is based on the factual allegation that Plaintiff loaned a sum of money to Berryhill & Company which has not been repaid. Although the pleadings do not state the exact dates that money was loaned to Berryhill & Company, the pleadings contain a time frame (June 2007-April 2008) in which multiple loans were made. Also, the pleadings do not allege what the specific terms of the loan were, but they contain the allegation that Plaintiff wrote the word “loan” on the checks made payable to Berryhill & Company.

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<sup>1</sup> This standard in *Partout* does not appear to be significantly different from that in *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 (2007) because both require a complaint to be based on some sort of factual allegation. To the extent that *Twombly* requires something more than what is required under *Partout*, this Court will not follow *Twombly* because the standard therein has not yet been adopted by Idaho appellate courts and is not binding.

### **A. Breach of Oral Contract**

There is no factual allegation that Plaintiff orally stated that the money was intended to be for a loan or that any of the Defendants orally agreed to repay the money. Plaintiff alleges that there were negotiations to establish a business relationship, but Plaintiff does not allege that there were any oral conversations or negotiations regarding the money. Even if the alleged facts are presumed to be true, the facts alleged do not support a finding of an oral contract. Consequently, Count 1 for Breach of an Oral Contract is dismissed for failing to state a claim upon which relief can be granted.

### **B. Breach of Implied-In-Fact Contract**

Because the plaintiff is not required to prove the existence of oral communications for an implied-in-fact contract, the plaintiff need only allege facts showing that a contract may be implied from the conduct of the parties, and the Plaintiff has done this. If the facts alleged in the Complaint are proven to be true, then that would be sufficient to show that the money was not a gift to Berryhill & Company and that the transaction constituted a loan agreement because Berryhill & Company accepted checks on which the Plaintiff wrote the word "loan." Although the course of dealing may be useful for understanding and interpreting the conduct between parties, the Plaintiff does not need to allege this "proof" in the pleadings. *See Fox v. Mt. W. Electric*, 137 Idaho 703, 52 P.3d 848 (2002)., Count 2 for Breach of Implied-In-Fact Contract is not dismissed because the Plaintiff has alleged facts demonstrating the existence of a contract.

### **C. Quasi Contract and Unjust Enrichment Against Berryhill & Company**

To establish a prima facie case for unjust enrichment, the plaintiff must show: "(1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof." *King v. Lang*, 136 Idaho 905, 910, 42 P.3d 698, 703 (2002). Plaintiff alleged each of these elements and also alleged that it would be unjust for Berryhill & Company to keep \$405,000 where it was communicated that the money was a loan. If Plaintiff's allegation is true that Plaintiff made a loan, rather than a gift, of \$405,000 to Berryhill & Company, then Plaintiff has stated a claim upon which the Court could find that the Defendants would be unjustly enriched by keeping this money. Count 3 is not dismissed because Plaintiff has alleged the essential elements and facts to

support a finding that there was a quasi-contract—that Berryhill & Company has been unjustly enriched.

#### **D. Conversion**

Plaintiff alleges he purchased fixtures and defendants refuse to return them. The reasonable inference is that he is the owner of the fixtures. Plaintiff alleges it purchased furniture and fixtures with a total value of \$10,532.00 which Berryhill & Company is refusing to return. Plaintiff has generally identified what property it claims has been converted and has put the Defendants on notice of the claim and the general facts supporting the claim. Count 4 is not dismissed.

#### **E. Quasi Contract and Unjust Enrichment Against John and Amy Berryhill Individually**

Defendants claim that this cause of action is really an attempt to pierce the corporate veil and that Plaintiff has not alleged sufficient facts to establish a claim for piercing the corporate veil. There are two bases for piercing the corporate veil, fraudulent transfer and alter ego, neither of which has been alleged in the Complaint. *See Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 165 P.3d 261 (2007). Although Plaintiff sets forth the allegations in its response to the Defendants' motion as the Plaintiff believes that they can be implied from the Complaint, the factual allegations necessary to support a claim for piercing the corporate veil are not in the Complaint. To the extent that the claim against John and Amy Berryhill is a claim to pierce the corporate veil, the claim is dismissed. To the extent that the claim is for unjust enrichment and not piercing the corporate veil, the Plaintiff has not alleged that it conveyed a benefit on John and Amy Berryhill individually, and thus, Count 5 is also dismissed because Plaintiff alleged no facts in support of the elements of an unjust enrichment claim against John and Amy Berryhill individually. If there is an unjust enrichment claim, the claim would lie with the corporation from whom the alleged money was taken.


This count is dismissed.

## CONCLUSION

Defendants' Motion to Dismiss is granted as to Counts 1 and 5, and denied as to Counts 2, 3, and 4.

**IT IS SO ORDERED.**

Dated this 27 day of July 2009.

  
Darla Williamson, District Judge

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

Eric R. Clark  
P.O. Box 2504  
Boise, Idaho 83701

Dan Williams  
P.O. Box 1776  
Boise, Idaho 83701

Dated this 28<sup>th</sup> day of July 2009

  
Deputy Court Clerk

NO. 1121 FILED  
A.M. 11:21 P.M.

SEP 14 2009

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**AMENDED COMPLAINT  
AND  
DEMAND FOR JURY TRIAL**

Judge Williamson

\* \* \* \* \*

The Plaintiff, by and through counsel, hereby complains and alleges as follows:

**PARTIES AND JURISDICTION**

1. At all times relevant to these proceedings, the Plaintiff Mosell Equities, LLC, was a Limited Liability Company with its principle place of business in Eagle, Idaho. Glenn Mosell is the owner and sole member of Mosell Equities.



2. At all times relevant to these proceedings the Defendant Berryhill & Company, Inc. was a duly formed corporation operating in Ada County, Idaho. Defendant John E. Berryhill III is the President of Berryhill & Company, Inc. and operates Berryhill & Co. restaurant in Boise, Idaho. Defendant Amy Berryhill is the Secretary of Berryhill & Company.

3. At all times relevant to these proceedings the Defendants John and Amy Berryhill resided in Ada County, Idaho, as husband and wife.

4. The amount claimed for damages exceeds \$10,000.00, the jurisdictional limit of this Court.

### **FACTS AND ALLEGATIONS**

5. On June 28, 2007, John Berryhill and Glenn Mosell made a copy of a check written from Mosell Equities, LLC to "Berryhill & CO." and on the same page as that copy John Berryhill wrote "This is a loan from Mosell Equities to cover some misc. downtown expenses during our bookkeeper transition. It will go into the general check register & be used for any billing of payables needed for downtown or Berryhill & Co. It will be transitioned into part of Glenn's 'buy in' of Moberry Venture Corp. Inc." A true and correct copy is attached as **Exhibit A**.

6. Berryhill signed this document individually with no indication he was signing in his capacity as President of Berryhill & Company, Inc.

7. Thereafter, Mosell Equities wrote 9 more checks to Berryhill & Co. between June 2007 and April 2008, for a total loan amount of FOUR HUNDRED FIVE THOUSAND DOLLARS (\$405,000.00).

8. Mosell Equities loaned these funds to John Berryhill and Berryhill & Company, Inc. while Glenn Mosell and John Berryhill were considering establishing a business relationship, initially in a company called MOBERRY, and subsequently, by Mosell Equities acquiring a 50% ownership in Berryhill & Company, John Berryhill's corporation.

9. The parties retained legal counsel, Victoria Meyers, who when directed by the parties drafted the appropriate entity and operational documents. These documents confirmed John Berryhill and Berryhill & Company considered Mosell Equities' funds as loans to Berryhill & Company. However, the parties never formed MOBERRY and Mosell Equities never acquired its 50% ownership interest in Berryhill & Company. (A true and correct copy of these documents is attached as **Exhibit B.**)

10. As the parties never pursued their prospective ventures, Mosell Equities' loaned funds remained as loans to John Berryhill and Berryhill & Company.

11. The parties formalized their agreement as indicated in Exhibit A, in writing, and in addition to the initial agreement that Berryhill signed, Glenn Mosell noted that Mosell Equities' funds were "loans" to Berryhill & Company on the checks Mosell thereafter issued to Berryhill & Company. True and correct copies of the 10 loan checks are attached and incorporated as **Exhibit C.**

12. Thereafter, Berryhill & Company carried the loans in its financial records as obligations to Mosell Equities, LLC, as directed by John Berryhill.

13. Prior to filing this action, Mosell Equities provided written demand upon John Berryhill and Berryhill & Company for repayment of the loaned funds. Berryhill and his company replied by refusing to refund the loans and by claiming the loans were not really loans

at all. (A true and correct copy of a letter from Berryhill's counsel in which Berryhill claims the funds "did not constitute a loan," despite Berryhill's written confirmation in Exhibit A, is attached as **Exhibit D** .)

14. Mosell Equities also purchased furniture and fixtures, with a value of TEN THOUSAND FIVE HUNDRED THIRTY-TWO DOLLARS (\$10,532.00), which Berryhill & Company possesses, continues to use, and refuses to return to Mosell Equities.

**COUNT ONE - BREACH OF CONTRACT  
DEFENDANTS JOHN BERRYHILL AND BERRYHILL & CO.**

15. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

16. Mosell Equities loaned money to John Berryhill and Berryhill & Company and they agreed to repay the debt as indicated in writing in **Exhibit A**.

17. After requesting repayment, John Berryhill and Berryhill & Company denied the parties had contracted, asserted that no loan existed, and refused to repay the loan.

18. By refusing to repay the loan, John Berryhill and Berryhill & Company are in breach and that breach is material.

19. As a direct, proximate and consequential result of John Berryhill and Berryhill & Company's breach, Mosell Equities has and continues to suffer damages in the amount of \$405,000.00 plus accumulating statutory interest.

**COUNT TWO - BREACH OF AN IMPLIED-IN-FACT CONTRACT  
DEFENDANTS JOHN BERRYHILL AND BERRYHILL & COMPANY.**

20. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

21. John Berryhill and Berryhill & Company requested that Mosell Equities lend John Berryhill and Berryhill & Company money, and John Berryhill and Berryhill & Company promised to repay the loan.

22. Mosell Equities performed and lent John Berryhill and Berryhill & Company money.

23. John Berryhill and Berryhill & Company have and continue to refuse to repay the loan.

24. As a direct, proximate and consequential result of John Berryhill and Berryhill & Company's breach, Mosell Equities has and continues to suffer damages in the amount of \$405,000.00 plus accumulating statutory interest.

**COUNT THREE - QUASI-CONTRACT – UNJUST ENRICHMENT  
DEFENDANTS JOHN BERRYHILL AND BERRYHILL & COMPANY, INC.**

25. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

26. Mosell Equities provided a benefit to John Berryhill and Berryhill & Company, Inc. by loaning them \$405,000.00.

27. John Berryhill and Berryhill & Company, Inc. accepted the benefit by accepting the loaned funds.

28. Under the circumstances, it is inequitable and unjust for John Berryhill and Berryhill & Company, Inc. to retain the benefit of the \$405,000.00 loan without compensating Mosell Equities for the principle amount of the loan plus accumulating statutory interest.

**COUNT FOUR - CONVERSION  
DEFENDANT BERRYHILL & COMPANY**

29. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

30. Mosell Equities purchased furniture and fixtures with a total value of \$10,532.00 that Berryhill & Company possesses, is using, and refuses either to return to Mosell Equities or to compensate Mosell Equities for these items.

31. Berryhill & Company continued possession of Mosell Equities' property constitutes conversion.

32. As a direct and proximate result of the conduct of Defendant Berryhill & Company, Inc. Mosell Equities has suffered damages of \$10,532.00.

**COUNT FIVE – FRAUD IN THE INDUCEMENT  
DEFENDANTS JOHN BERRYHILL AND BERRYHILL & CO.**

33. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

34. John Berryhill represented to Glenn Mosell in writing that monies Mosell Equities, LLC loaned to Berryhill & Co. would remain as loans to Berryhill & Co. and if the parties ultimately formed another business entity, then those funds would be “transitioned” into Mosell Equities' “buy in” of that new business entity.

35. This was a false statement.

36. This statement was material because Mosell Equities, LLC would not have loaned funds to Berryhill & Company, Inc. without the potential of a future business relationship or the potential of repayment for the loaned funds.

37. John Berryhill knew the statement was false and upon receiving demand from Mosell Equities, Berryhill, through his counsel, denied that Mosell Equities' loaned funds were loans at all.

38. John Berryhill intended that Mosell Equities would act upon this statement and loan money to Berryhill & Company, Inc.

39. Glenn Mosell was not aware John Berryhill's statement was false, and relied on Berryhill's statement as true.

40. Mosell had a right to rely on John Berryhill's representations as Berryhill was an established restaurateur and businessman, and the planned business arrangement appeared legitimate.

41. As a direct and proximate result of John Berryhill's conduct, Mosell Equities has suffered damages of \$405,000.00, plus accumulating interest.

#### **COUNT SIX – PIERCING THE CORPORATE VEIL**

42. Mosell Equities repeats and re-alleges all previous paragraphs as if set forth herein.

43. Berryhill & Company, Inc. is the alter ego of John and Amy Berryhill.

44. John Berryhill is the sole shareholder in Berryhill & Company, Inc.

45. Amy Berryhill is the corporate secretary of Berryhill & Company, Inc.

46. There are no other officers or directors of Berryhill & Company, Inc. other than John Berryhill and Amy Berryhill.

47. John and Amy Berryhill routinely use corporate assets for their personal use.

48. John and Amy Berryhill dine and entertain guests at the Berryhill & Co. restaurant without paying and take restaurant wine and food home without compensating the corporation.

49. John and Amy Berryhill use corporate credit cards to purchase gas for their personal vehicles that are used in non-corporate related activities.

50. John and Amy Berryhill have used funds in corporate accounts to pay for improvements in and to their personal residences.

51. John and Amy Berryhill use restaurant gift certificates to barter for their personal benefit.

52. When John Berryhill signed the contract attached as Exhibit A, he did not indicate he was signing as an officer or director of Berryhill & Company, Inc.

53. The Berryhill's conduct indicates there is such a unity of interests and ownership the separate personalities of the Berryhills as individuals and Berryhill & Company, Inc. as a separate corporate entity no longer exist.

54. If the Berryhills are allowed to hide behind the corporate shield and avoid personal liability for the money Mosell Equities loaned Berryhill & Company, Inc., an inequitable result would follow, and such a result would sanction a fraud and promote injustice.

#### **ATTORNEY FEES**

55. Mosell Equities was forced to hire and retain legal counsel to protect its interests and is therefore entitled to recover according Idaho Code § 12-120(3), and § 12-121, and the Idaho Rules of Civil Procedure, the attorney fees it has expended pursuing recovery from the Defendants.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff prays for judgment against the Defendants as follows:

1. For an Order and Judgment stating that an actual or equitable contract existed between Plaintiff Mosell Equities and Defendants John Berryhill and Berryhill & Company, Inc., whereby Mosell Equities loaned a total of FOUR HUNDRED AND FIVE THOUSAND DOLLARS (\$405,000.00), to Defendants John Berryhill and Berryhill & Company, Inc., and that Defendants John Berryhill and Berryhill & Company, Inc. are in breach of that contract;
2. For and Order and Judgment against Defendants John Berryhill and Berryhill & Company, Inc. for the principal amount of the loans of FOUR HUNDRED AND FIVE THOUSAND DOLLARS (\$405,000.00), plus statutory interest of 12% according to Idaho Code § 28-22-104;
3. For and Order and Judgment piercing the corporate veil of Berryhill & Company, Inc., and thereby entering judgment against Defendants John and Amy Berryhill, jointly and severally, for the principal amount of the loans of FOUR HUNDRED AND FIVE THOUSAND DOLLARS (\$405,000.00), plus prejudgment interest allowed by law;
4. For and Order and Judgment against Defendant Berryhill & Company, Inc. for the value of Mosell Equities' furniture and fixtures of TEN THOUSAND FIVE HUNDRED THIRTY-TWO DOLLARS (\$10,532.00);
5. For an Order and Judgment requiring all Defendants to pay attorney fees and litigation costs to the Plaintiff of not less than \$3,500.00 in the event default is obtained and default judgment is entered, and the actual amount of attorney fees and litigation costs the Plaintiff expends if this matter is contested; and,



6. For such other relief the Court determines is appropriate and proper under the circumstances.

**DEMAND FOR JURY TRIAL**

The Plaintiff requests a jury of not less than 12 members to deliberate on all issues raised in these pleadings.

DATED this 14th day of September 2009.

CLARK & ASSOCIATES, ATTORNEYS



---

Eric R. Clark,  
For the Plaintiff

AMENDED COMPLAINT EXHIBIT A

MOSELL EQUITIES LLC  
P.O. BOX 1694  
EAGLE, ID 83616

92-7014/3241  
0097002028

5127

DATE:

4/28/07

PAY TO  
THE ORDER OF

Berryhill & Co

\$50,000

Fifty Thousand no/100

DOLLARS



Home Federal  
MEMO

HomeLine #488-8000  
EAGLE BRANCH  
100 E RIVERSIDE DR - EAGLE, ID 83616

loan

*Handwritten signature: JH M-11*

⑆324170140⑆

0097002028 5127

This is a loan from Mosell Equities to cover  
some misc. downtown expenses during our bookkeeper  
transition. It will go into the general check register &  
be used for any billing of payables needed for downtown  
or Berryhill & Co.  
It will be transitioned into part of Glenis "buy in" of  
Moberly Venture Corp. Inc.

*Handwritten signature: JH M-11*

*Handwritten signature: JH M-11*

AMENDED COMPLAINT EXHIBIT B

**EBERLE, BERLIN, KADING, TURNBOW, MCKLVEEN & JONES,  
CHARTERED**

ATTORNEYS AND COUNSELORS AT LAW  
BOISE PLAZA  
1111 WEST JEFFERSON STREET, SUITE 530  
POST OFFICE BOX 1368  
BOISE, IDAHO 83701

TELEPHONE  
(208) 344-8535

FACSIMILE  
(208) 344-8542

L. VICTORIA MEIER  
E-MAIL: [vmeier@eberle.com](mailto:vmeier@eberle.com)

February 27, 2008

**PRIVATE AND CONFIDENTIAL**

John Berryhill, President  
Berryhill & Company, Inc.  
121 North 9th Street, Suite 102  
Boise, Idaho 83702

Glenn E. Mosell  
Post Office Box 1694  
Eagle, Idaho 83616

Re: *Stock Purchase Agreement*

Dear John & Glenn:

Please find enclosed the following documents reflecting the proposed stock purchase by Glen:

- (1) Special Meeting of the Board of Directors and Shareholders of Berryhill & Company, Inc.
- (2) Stock Purchase Agreement
- (3) Satisfaction of Loan
- (4) Copy of the Stock Certificate No. 3.

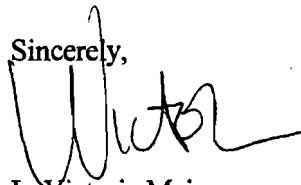
Please review these documents carefully to ensure that the documents meet with your approval. If they do, please contact me and I will arrange to have final copies sent to you for original signature. If you have any comments or changes contact me to discuss.

Additionally, if you have not done so already, please review the existing Bylaws and Restrictive Purchase and Redemption Agreement of the Company. Neither document has been executed. However, in the interest of saving costs and provided they meet with your approval, I can prepare a one-page agreement, stating that the two of you intend to be bound by these two agreements.

February 26, 2008  
Page 2

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Sincerely,

A handwritten signature in black ink, appearing to read 'L. Victoria Meier', written over the word 'Sincerely,'.

L. Victoria Meier

LVM  
cc: A. Dempsey

**DRAFT**

**BERRYHILL & COMPANY, INC.  
SPECIAL MEETING OF THE  
BOARD OF DIRECTORS AND SHAREHOLDERS**

**Effective the December 31, 2007**

The undersigned, being Secretary of BERRYHILL & COMPANY, INC., an Idaho corporation (the "Company"), by this instrument evidences the actions and resolutions undertaken at the special meeting of the Board of Directors and Shareholders of the Company. Present was the sole Shareholder and the Directors who waived notice of the meeting.

**WHEREAS**, the Company has borrowed Four Hundred Thousand Dollars from Glenn E. Mosell for the funding of the relocation of the Company's restaurant to a new location and for the capital improvements to be made to the restaurant and banquet rooms.

**WHEREAS**, Glenn E. Mosell desires to acquire an interest in the Company in exchange for, and as repayment of, the amount lent to the Company.

**WHEREAS**, the Directors and the Sole Shareholder believe it is in the best interest of the Company to issue Glenn E. Mosell two hundred (200) shares of the common capital stock of the Company as repayment of the amount lent to the Company.

**RESOLVED**, that upon receipt of the Satisfaction of Loan evidencing that the Company's obligation to Mosell has been paid, the Directors are hereby authorized to issue two hundred (200) shares of the one dollar (\$1) par value common capital stock of the Company to Mosell.

**RESOLVED**, that the Officers of the Company are authorized and directed to execute any agreements and documents in connection with the issuance of the two hundred (200) shares of the Company's common capital stock.

There being no unattended business to come before the meeting, the meeting was adjourned.

DATED effective as of the 31<sup>st</sup> day of December, 2007.

By: \_\_\_\_\_  
Amy Berryhill  
Its: Secretary

**DRAFT**

## **STOCK PURCHASE AGREEMENT**

THIS STOCK PURCHASE AGREEMENT (hereinafter "Agreement") is made and entered into effective the \_\_\_\_ day of \_\_\_\_\_, 2007, by and between **BERRYHILL & COMPANY, INC.**, an Idaho corporation (the "Corporation"), and **GLENN E. MOSELL**, a married man dealing with his separate property ("Mosell").

### **WITNESSETH:**

WHEREAS, John Berryhill (the "Shareholder") is the sole shareholder and record owner of two hundred (200) shares, \$1.00 par value, of the issued and outstanding common capital stock of **BERRYHILL & COMPANY, INC.**, an Idaho corporation (hereinafter the "Corporation"). John Berryhill's shares represent one hundred percent (100%) of the issued and outstanding common capital stock of the Corporation and are evidenced by Certificates No. 1 and No. 2.

WHEREAS, during the calendar year of 2007, Mosell loaned the Corporation Four Hundred Thousand Dollars (\$400,000) to fund the relocation of the Corporation's restaurant and for capital improvements needed for the Corporation's restaurant and banquet rooms (the "Loan").

WHEREAS, the Corporation desires to issue two hundred (200) shares of the Corporation's common capital stock to Mosell as repayment of the Loan. Mosell desires to accept the two hundred (200) shares of the Corporation's common capital stock as repayment of the Loan and to have the Loan reclassified on the Corporation's books and records as a capital contribution from Mosell.

WHEREAS, after the execution of this Agreement, Mosell and the Shareholder will each own fifty percent (50%) of the common capital stock of the Corporation.

WHEREAS, the Directors of the Corporation and the Shareholder have agreed that it is in the best interest of the Corporation to authorize and to admit Mosell as a shareholder of the Corporation and to reclassify the Loan as a capital contribution from Mosell as payment for the two hundred (200) shares pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, Corporation, Shareholder, and Mosell agree as follows:

**1. Issuance of Stock.** The Corporation shall issue two hundred (200) shares of the common capital stock of the Corporation (the "Shares") in the name of Glenn E. Mosell evidenced by Certificate No. 3.

**2. Subscription Price.** The subscription price for the Shares shall be Four Hundred Thousand Dollars (\$400,000).

**3. Payment of Subscription Price.** Mosell shall pay the Subscription Price by canceling the Loan and thereafter authorizing the Corporation to reclassify the Loan on the Corporation's books and records as a capital contribution from Mosell to the Corporation.



**DRAFT**

4. **Closing.** The transactions contemplated herein shall close on or before March \_\_\_\_\_, 2008, at a place and at a time mutually agreeable by the parties.

5. **Closing Obligations.**

a. Closing Obligations of Corporation. At Closing, the Corporation shall deliver to Mosell Certificate No. 3 issued in Mosell's name evidencing ownership of the Shares.

b. Closing Obligations of Mosell. At Closing, Mosell shall present to the Corporation Satisfaction of Loan evidencing that the Loan has been paid in full.

6. **Warranties of Corporation.** The Corporation warrants to Mosell that:

- (a) The Corporation has the full power and authority to issue such Shares;
- (b) The transactions contemplated herein have been authorized and approved by the Corporation's Directors and Shareholder in a meeting duly called for that purpose; and
- (c) The Shares are not subject to any liens, encumbrances, or restrictions except those imposed under this Agreement.

7. **Restrictions on Transfer.** Mosell may not sell, transfer, convey, or alienate the Shares to any person without the prior unanimous approval of the shareholders of the Corporation. The Shares are further restricted as set forth in the Corporation's Restrictive Stock Purchase And Redemption Agreement, which restrictions are incorporated herein by reference as if set forth herein in full. A conspicuous legend setting forth such restrictions shall be placed upon the Certificate representing the Shares.

8. **Familiarity with Corporation.** Mosell acknowledges familiarity with the business of the Corporation and has made such investigations as Mosell has determined are prudent or necessary with respect to the value of the Corporation and the Shares being acquired by Mosell hereunder. Mosell acknowledges that the Corporation has made available to Mosell all reasonable information concerning the Corporation requested by Mosell in connection with Mosell's investigation. Mosell agrees to keep strictly confidential all information disclosed to Mosell by the Corporation in connection with Mosell's investigation.

9. **Integration Clause.** This Agreement, together with the Corporation's Bylaws and Restrictive Stock Purchase And Redemption Agreement, encompass the entire agreement of the parties hereto with respect to the subject matter of this Agreement. Such agreements may not be modified except by written a document executed by all parties hereto.

10. **Succession.** This Agreement shall inure to the benefit of and be binding upon the parties hereto and upon their successors in interest of any kind whatsoever.

11. **Amendments.** This Agreement may only be amended, modified, or changed by a written document signed by all parties hereto.

12. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original.

**DRAFT**

**13. Governing Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of Idaho.

**14. Time and Waiver.** Time and the prompt performance of each and every obligation of the parties hereto is agreed to be of the essence of this Agreement. Any departure from the conditions and terms of this Agreement, or any delay in the enforcement of the same by either party, shall not operate to waive or be a waiver of the rights of either party to stand upon the strict letter or construction of this Agreement or to require performance in accordance with the express terms set forth herein.

**15. Attorneys Fees.** If either party hereto defaults in any manner or fails to fulfill any and all provisions of this Agreement, and if the non-defaulting party places this Agreement with an attorney to exercise any of the rights of the non-defaulting party upon such default or failure, or if suit be instituted or defended by the non-defaulting party by reason of, under or pertaining to such default or failure, then the non-defaulting party shall be entitled to recover reasonable attorneys fees, costs and expenses from the defaulting party. This paragraph shall be enforceable by the parties notwithstanding any rescission, forfeiture or other termination of this Agreement.

**16. Severability.** In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

**17. Preparation of Documents.** The Corporation has retained the law firm of Eberle, Berlin, Kading, Tumbow & McKlveen, Chartered, to prepare this Agreement and other documents pertaining to this transaction. Mosell acknowledges that the aforementioned law firm represents only the Corporation in this matter and cannot represent his interests in any way. Therefore, Mosell understands he should consult independent legal counsel in the event it has any questions concerning this Agreement.

**18. Further Assurances.** Each of the parties hereto agrees to execute any other documents necessary or appropriate to effectuate the intention of the parties as expressed in this Agreement.

**19. Successor in Interest.** This Agreement shall be binding upon the successors and assigns, personal representatives, heirs, administrators, executors, legatees and devisees of the parties hereto.

**20. No Third Party Beneficiaries.** It is the intention of the parties that no individual or entity shall be construed or considered to be an intended or implied third-party beneficiary under this Agreement, or shall in any way have a right to enforce this Agreement or seek any rights hereunder.

**21. Recitals.** The recitals to this Agreement are incorporated into this Agreement as if set forth in full herein.

**IN WITNESS WHEREOF**, the parties have executed this Agreement effective the day and year first above written.

**CORPORATION:**

**BERRYHILL & COMPANY**, an Idaho  
corporation

By: \_\_\_\_\_  
**JOHN BERRYHILL**, President

By: \_\_\_\_\_  
**JOHN BERRYHILL**, Shareholder

**MOSELL:**

\_\_\_\_\_  
**GLENN E. MOSELL**

**DRAFT**

**SATISFACTION OF LOAN**

KNOW ALL MEN BY THESE PRESENTS, that **GLENN E. MOSELL**, a married man dealing with his sole and separate property, does hereby certify and declare that the certain Loan in the original amount of Four Hundred Thousand Dollars (\$400,000) made and entered into by **BERRYHILL & COMPANY**, an Idaho corporation, as "borrower", to **GLENN E. MOSELL**, as "lender", is fully paid, satisfied and discharged.

DATED: \_\_\_\_\_, 200\_.

\_\_\_\_\_  
Glenn E. Mosell

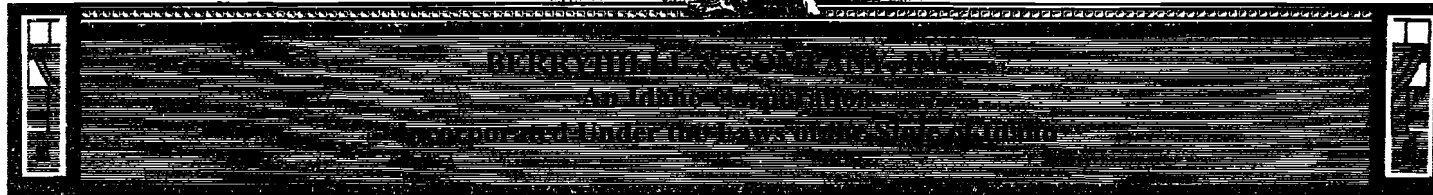
STATE OF IDAHO    )  
                              ) ss.  
County of Ada        )

On this \_\_\_\_ day of \_\_\_\_\_, 2008, before me, the undersigned, a notary public in and for said state, personally appeared **GLENN E. MOSELL**, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

\_\_\_\_\_  
Notary Public for Idaho

My Commission Expires: \_\_\_\_\_

**DRAFT***Note: See the Reserve Side of this Certificate for Restrictions Concerning Transferability of this Stock***This Certifies that***registered holder of*

GLENN E. MOSELL

*is the*

TWO HUNDRED (200)

*Shares*

*transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.*

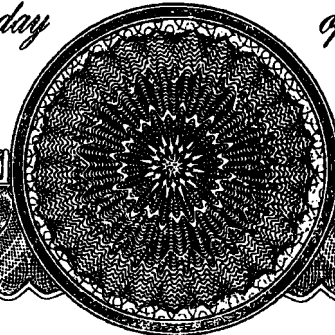
*In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed*

*this \_\_\_\_\_ day \_\_\_\_\_ of \_\_\_\_\_ A.D. 20 \_\_\_\_\_*

President

Secretary

00161364.000.DOC



The stock represented by this certificate is not transferable unless approved by the stockholders as set forth in Article 15.1 of the Bylaws of the Corporation, and is subject to the Corporation's Restrictive Stock Purchase and Redemption Agreement.

The securities represented hereby have not been registered under the Securities Act of 1933 or any State Securities Act. Any transfer of such securities will be invalid unless a registration statement under said Act(s) is in effect as to such transfer or in the opinion of counsel for the company such registration is unnecessary in order for such transfer to comply with said Act(s).

If the Corporation has elected to be treated as an "S" corporation, the stock may not be sold to any person or entity which, at such time, would not be a qualified stockholder of an "S" corporation under the Internal Revenue Code.

*For Value Received, \_\_\_\_\_ hereby sell, assign and transfer*  
*unto \_\_\_\_\_*  
*\_\_\_\_\_ Shares*  
*represented by the within Certificate, and do hereby*  
*irrevocably constitute and appoint*  
*\_\_\_\_\_ Attorney*  
*to transfer the said Shares on the books of the within named*  
*Corporation with full power of substitution in the premises.*  
*Dated \_\_\_\_\_ A.D. 20 \_\_\_\_\_*  
*In presence of \_\_\_\_\_*

NOTICE: THE SIGNATURE OF THIS ASSIGNMENT  
MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE  
FACE OF THE CERTIFICATE, IN EVERY PARTICULAR, WITHOUT  
ALTERATION OR ENLARGEMENT OR ANY CHANGE WHATSOEVER.

AMENDED COMPLAINT EXHIBIT C





<b>MOSELL EQUITIES LLC</b> P.O. BOX 1694 EAGLE, ID 83626		82-7084/2011 009700228 <b>5137</b>
DATE <u>7/30/07</u>		
PAY TO <u>Berryhill &amp; Co</u>		<u>\$25,000</u>
THE ORDER OF <u>Twenty Five Thousand no/100</u>		CHECK NO. <u>5137</u>
<b>Home Federal</b> MEMPHIS 1111 RIVERVIEW DR - EAGLE, ID 83626		<u>[Signature]</u>
⑆324170140⑆ 0097002028⑆ 5137 ⑆0002500000⑆		

000116

MOSELI EQUITIES LLC		5139
P.O. BOX	8/2/07	
WALTON, MO 64616		
Pay to the order of <u>Berryhill Co</u>		\$ 25,000
Twenty Five Thousand <u>no</u> / 100		DOLLARS
Home Federal Bank - TIS		
324170140 0097002028 5139		


000117


MOSELL EQUITIES LLC		5140
DATE 8/16/07		
TO: Berryhill Co		\$25,000-
Twenty Five Thousand no/100		
Home Federal		
MEMO: loan #44		
324170140		0097002028 5140

000118


MOSELL EQUITIES LLC		ST. JOHNSBURY 5141
P.O. BOX 1094 ENCLIN, VT 05615		DATE <u>8/16/07</u>
Pay to the order of <u>Berryhill Company</u>		\$ <u>25,000</u>
Twenty Five Thousand <sup>00</sup> / <sub>100</sub>		
Home Federal Bank		<u>John M. Hall</u>
MEMO <u>Loan #5</u>		
⑆324170140⑆ 0097002028⑈ 5141		

000119

MOSELL EQUITIES LLC		5196
P.O. BOX 14010		
BALTIMORE, MD 21204		
DATE 10/19/07		
PAY TO THE ORDER OF <i>Berryhill Co</i>		\$ 60,000
<i>Steven Thorsen</i>		
		
Home Federal Bank		
Member FDIC		
332417014010097002028 5196		

MOSELL EQUITIES LLC P.O. BOX 1694 EAGLE, ID 83616		90-7046/2001 09/7002821	5201
DATE: 10/26/07			
PAY TO: <i>Berryhill Company</i>		\$ 100,000	
One Hundred Thousand <i>no/100</i> DOLLARS			
 Home Federal FIRST BRANCH 100 E. PINE AVE. DR. EAGLE, ID 83616		<i>John M. H</i>	
MEMO: <i>Loan</i>			
⑆324170140⑆		0097002028 5201	

000121

<b>MOSRI, EQUITIES LLC</b> P.O. BOX 1694 EAGLE, ID 83616		00-7014/3211 000700228	<b>5154</b>
DATE <u>12/4/07</u>			
PAY TO <u>Bernyhill &amp; Co.</u>		\$ <u>25,000</u>	
THE ORDER OF <u>Twenty Five Thousand No/100</u>		EXTRA AMOUNT <u>0</u>	
 <b>Home Federal</b> MEMBER FDIC 1001 W. GARDEN ST. SPOKANE, ID 83402		<u>Alm/11-11</u>	
MEMO <u>Loan</u>			
⑆324170140⑆		0097002028 5154	

000122

MOSELL EQUITIES LLC P.O. BOX 1094 EAGLE, ID 83616		SEPTEMBER 2007 CHECK NUMBER	5164
DATE 12/19/07			
PAY TO THE ORDER OF <i>Burroughs Co</i>		\$ 50,000~	
<i>Fifty Thousand &amp; no/100</i>		UNDEPOSITED	
Home Federal		SINCE 11-11-11	
MEMO <i>loan</i>			
⑆324170140⑆		0097002028⑆ 5164	

000123



MOSELL EQUITIES LLC P.O. BOX 1098 FAIRF, IN 46616		80-7814/2041 CONTINUOUS	5247
		DATE	4/30/08
PAY TO THE ORDER OF Burrell & Co. Twenty Thousand & no/100		\$ 20,000	
Home Federal 100 E. WINDYBROOK DR. - FAIRF, IN 46616		DOLLARS	
MEMO: Suite 101 TI's		[Signature]	
⑆324170140⑆		0097002028 5247	

000124

AMENDED COMPLAINT EXHIBIT D



THOMAS, WILLIAMS  
& PARK

April 2, 2009

**VIA TELEFAX: 938-9504 & U.S. MAIL**

Paul R. Mangiantini  
Mangiantini & Slomiak, LLP  
1191 E. Iron Eagle Dr., Suite 200  
Eagle, Idaho 83616

RE: Glenn Mosell

Dear Paul:

I'm writing in response to your letter of February 20, 2009. There are a number of inaccuracies and mischaracterizations in that correspondence, which I will respond to for you.

First and foremost, the funds described in your letter and claimed by Mr. Mosell or Mosell Equities, LLC, did not constitute a loan to John Berryhill or Berryhill & Co., Inc. ("Berryhills" or "Berryhill & Co."). I believe you will find no note, no security terms, no repayment terms, no interest rate, nor any of the other specific terms necessary in order to sustain the concrete requisites of a *bona fide* loan. Rather, despite the parties' inability to come to terms on any particular written contractual relationship, you will find that the extensive course of dealing indicates that the relevant funds constituted an investment by Mosell Equities, LLC, in a speculative venture dealing with the proposed development of Polo Cove near Sunnyslope in Canyon County, Idaho.

Apparently, Mr. Mosell is a developer and was interested in pursuing the Polo Cove project. He first contacted John Berryhill in approximately July of 2005 to ask him if he would put a restaurant in the development. Over many months of discussions, it was agreed that there would be a joint venture to develop Polo Cove with Mr. Mosell as the "money" man and Mr. Berryhill as a day-to-day operations man. Over the next many months, Mr. Berryhill devoted substantial time to working on the project, meeting with architects, designers, potential vendors, vintners, hotel developers, as well as other interested parties. Mr. Mosell constantly assured Mr. Berryhill that he would "take care of" Mr. Berryhill and that they would get "everything in writing". The roughly three years worth of emails and other documents in the possession of your client substantiate the enormous amount of time Mr. Berryhill devoted to this venture, for which he was not paid.

Plaza One Twenty One  
121 N. 9th Street, Suite 300  
P.O. Box 1776  
Boise, ID 83701

TEL 208 345-7800  
FAX 208 345-7894

EXHIBIT 1

000126

April 2, 2009

Page 2

At that time, Berryhill & Co. operated a restaurant at the Broadway Park Shopping Center in Boise. As part of the Polo Cove venture, Mr. Mosell eventually insisted that Mr. Berryhill move the restaurant to downtown to a site that would impress people he wanted to interest in Polo Cove, in addition to planning a new restaurant at the Polo Cove site. Mr. Mosell wanted to "splash the pot." Mr. Berryhill made it very clear that the move was too big a financial step for him to take on himself. Mr. Mosell represented that he was not going anywhere, that together they had "big things" to do. Throughout the construction of the new Berryhills restaurant Mr. Mosell told Mr. Berryhill not to "cheap out," not to worry about the cost of the buildout, "go big," "do it sexy." A good portion of the funds identified in your letter were dedicated to this buildout.

Potential investors and other interested parties were wined and dined by Mr. Mosell at the restaurant without charge. Mr. Mosell signed a letter of intent with Tomlinson & Associates for additional space on the ground floor of the same downtown building near the restaurant for a Polo Cove showroom, although Mr. Berryhill advised him it was too big. Mr. Berryhill told Mr. Mosell that this addition would considerably increase their liabilities. Mr. Mosell responded that Mr. Berryhill was not looking at "the big picture." Mr. Mosell could use the space for Polo Cove promotions in the day and Berryhills could use it for banquet and reception facilities in the evening. Mr. Mosell ordered expensive furniture for the space and Berryhills had to cover the remaining half of the cost of this furniture upon delivery. Berryhills is still being charged rent for this additional space.

Mr. Mosell began paying his rent for the promotional area at later and later times each month and had not paid for Polo Cove's portion of the buildout. Then the Polo Cove meetings stopped. Potential investors stopped coming to the restaurant. Others involved in Polo Cove started asking Mr. Berryhill about Mr. Mosell, saying he would not return their calls and they had not been paid for their work. The funds identified in your letter included some amounts paid to attorneys to draft contracts between Berryhill & Co., Inc., and Mosell Equities, LLC, which were not executed. It is my understanding that an amount owed to attorney Kim Gourley is still unpaid.

You will also note that earlier Kim Gourley started out representing both Mosell Equities, LLC, and Mr. Berryhill as co-buyers in a lawsuit arising from a Purchase and Sale Agreement relating to the Broadway Park Shopping Center, where Berryhills then was located (Mr. Gourley was later replaced). At Mr. Mosell's urging, litigation was initiated, which was unsuccessful. Part of the funds that Mr. Mosell is now seeking repayment was for attorney fees arising out of this case.

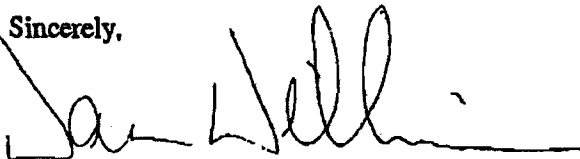
April 2, 2009  
Page 3

Although it is true that certain documents reference "loans" by either Glen Mosell or Mosell Equities, Inc., you will find that the "loan" label was attached because of instructions from Mr. Mosell himself to Berryhills' bookkeeper without Mr. Berryhill's involvement. As such, they represent nothing more than a label that Mr. Mosell unilaterally applied to the funds.

If we calculate the additional costs for which Mr. Berryhill is responsible, including increased rent, buildout of additional space, as well as the enormous contribution of time expended by Mr. Berryhill in the Polo Cove venture, the Berryhills contribution exceeds that identified by Mr. Mosell. Moreover, without Mr. Mosell's inducements into the Polo Cove venture, Berryhills would still be operating at Broadway with much reduced expenses and attendant risk. Because of Mr. Mosell's inducements and representations, Berryhills is responsible for much greater operating expenses in a very challenging environment for restaurants.

In short, Mr. Mosell is now asking John Berryhill or Berryhill & Co. to refund a good part of his speculative investment in Polo Cove, as if Berryhills was a guarantor of that investment. Based on the course of dealing between the parties, it is clear that Berryhills was no such guarantor or borrower. We believe that, after an exhaustive review of the course of dealing involved here over three years, a jury will find that there were no "loans." Accordingly, we must decline your client's invitation to reimburse him for his own investment in this failed venture.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Williams", with a long horizontal line extending to the right.

Daniel E. Williams

DEW:g

NO. 11-2 FILED  
A.M. 11:21 P.M.

SEP 14 2009

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**PLAINTIFF'S MOTION TO  
RECONSIDER THE COURT'S  
DISMISSAL OF DEFENDANTS JOHN  
AND AMY BERRYHILL**

Judge Williamson

\* \* \* \* \*

COMES NOW the Plaintiff Mosell Equities, LLC and according to Rule 11(a)(2)(B),  
IRCP, and hereby requests that the Court revisit its decision dated July 29, 2009 in which the  
Court dismissed the Defendants John Berryhill and Amy Berryhill.

The motion is timely as although the Court entered an order dismissing these Defendants,  
no judgment has been requested or entered.

PLAINTIFF'S MOTION TO RECONSIDER THE COURT'S DISMISSAL OF DEFENDANTS JOHN  
AND AMY BERRYHILL - 1

000129

Additionally, the Plaintiff has clearly identified its counsel by name and complete mailing address in the Complaint and subsequent pleadings, yet the court clerk sent the Plaintiff's copy of the July 29, 2009, decision to an address in Boise, Idaho, when Plaintiff's counsel's address is in Eagle, Idaho. The Plaintiff did not receive a copy of the decision until September 11, 2009, and thereafter immediately filed this motion.

The Court did not indicate in its decision as to whether or not the dismissal was with prejudice. If the order dismissing was without prejudice, then this issue is moot as the Plaintiff has filed an Amended Complaint without leave of the Court as the Defendants have not yet filed a responsive pleading.

If the Court dismissed with prejudice, then the Plaintiff respectfully requests the Court revisit its decision and reconsider.

The Plaintiff has filed a short memorandum in support of this motion and hereby requests oral argument.

DATED this 14th day of September, 2009.

CLARK & ASSOCIATES, ATTORNEYS



---

Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 14th day of <sup>September</sup> ~~July~~, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK



SEP 14 2009

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION TO  
RECONSIDER THE COURT'S  
DISMISSAL OF DEFENDANTS JOHN  
AND AMY BERRYHILL**

Judge Williamson

\* \* \* \* \*

COMES NOW the Plaintiff and by and through its counsel of record and hereby provides  
the court with its Memorandum in Support of Plaintiff's Motion to Reconsider.

**ARGUMENT**

1. Piercing the Corporate Veil. While the Court cites to *Partout v. Harper*, 145 Idaho  
683, 183 P.3d 771 (2008), it appears the Court has misquoted that decision. Than actual

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER THE COURT'S  
DISMISSAL OF DEFENDANTS JOHN AND AMY BERRYHILL - 1

000132

language is, “A complaint need *only* contain a concise statement of the facts....” *Id.* (Emphasis added) Moreover, *Partout* was decided at summary judgment and did not address the 12(b)(6), IRCP standard.

The Plaintiff does agree with the Court that the “beyond doubt” standard in *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156 (2005), is applicable to a Rule 12(b)(6) motion, but the Court does not appear to apply that standard when evaluating the Plaintiff’s pleadings.

The Court’s decision on Count 5 is as follows:

Defendants claim that this cause of action is really an attempt to pierce the corporate veil and that Plaintiff has not alleged sufficient facts to establish a claim for piercing the corporate veil. There are two bases for piercing the corporate veil, fraudulent transfer and alter ego, neither of which has been alleged in the Complaint. *See Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 165 P.3d 261 (2007). Although Plaintiff sets forth the allegations in its response to the Defendants’ motion as the Plaintiff believes that they can be implied from the Complaint, *the factual allegations necessary to support a claim for piercing the corporate veil are not in the Complaint.* To the extent that the claim against John and Amy Berryhill is a claim to pierce the corporate veil, the claim is dismissed.... (Emphasis added)

“A motion to dismiss for failure to state a claim should not be granted ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.’” *Taylor v. Maile*, 142 Idaho at 257. The standard is not that the plaintiff has to plead or allege facts, but the standard is *prove* facts. The Plaintiff alleges in paragraph 32 of the Complaint, “Mosell Equities on good faith believes that Defendant John and Amy Berryhill have taken some, if not all of the money Mosell Equities loaned to Defendant Berryhill’s company out of Berryhill’s company and used that money for their personal benefit.” If that allegation is true, which the Court must conclude at this stage of the litigation it is, then the Berryhill’s conduct could warrant piercing the corporate veil. Consequently, on this statement alone, the Court

cannot conclude “*beyond doubt*” that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”

At best, the Court, before dismissing the Berryhill Defendants, should have allowed the Plaintiff to amend and to plead additional facts, which it has done. The Court did not make the requisite finding “*beyond doubt*,” and based on the pleadings, there was no factual basis to support such a conclusion.

The Court also cited to *Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986), and states “The purpose of the complaint is ‘to inform the defendant of the material facts upon which the plaintiff bases his action.’” However, that statement has more meaning when placed in the context of the actual decision. The *Clark* Court stated:

We begin our discussion by noting that technical rules of pleading have long been abandoned in this state. *Rauh v. Oliver*, 10 Idaho 3, 9, 77 P. 20, 21-22 (1904). The general policy behind the current rules of civil procedure is to provide every litigant with his or her day in court. *Sines v. Blaser*, 98 Idaho 435, 437, 566 P.2d 758, 760 (1977). The rules are to be construed to secure a just, speedy and inexpensive determination of every action or proceeding. I.R.C.P. 1(a). The purpose of a complaint is to inform the defendant of the material facts upon which the plaintiff bases his action. *Fox v. Cosgriff*, 64 Idaho 448, 454, 133 P.2d 930, 932-33 (1943). A complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief. I.R.C.P. 8(a)(1); *Stone v. Bradshaw*, 64 Idaho 152, 157, 128 P.2d 844, 846 (1942).

*Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993 (1986).

The Plaintiff’s complaint alleges that John and Amy Berryhill were officers in a corporation and took money that was loaned to the corporation for corporate business out of that corporation and used that money for their personal benefit. The Complaint therefore states “a concise statement of the facts” to support a claim for piercing the corporate veil.

2. Unjust Enrichment. The Court also appears to have misconstrued the elements of an unjust enrichment claim.

In its decision, the Court appears to require some type of privity between the plaintiff and the party receiving the benefit. However, no such requirement exists. "The essence of the quasi-contractual theory of unjust enrichment is that the defendant has received a benefit which would be inequitable to retain at least without compensating the plaintiff to the extent that retention is unjust." *Hertz v. Fiscus*, 98 Idaho 456, 567 P.2d 1 (1977). In this case, the Plaintiff alleged it loaned money to the corporation, but the Berryhills took the loaned money and personally benefited. Based on those facts, it is clear the Plaintiff has pled the requisite elements of an unjust enrichment claim against John and Amy Berryhill as they took the money and received the benefit.

### CONCLUSION

The Plaintiff respectfully requests that the Court amend its Order dismissing the Berryhill defendants to indicate the dismissal was *without prejudice*.

In the alternative, the Plaintiff respectfully requests the Court reverse its decision and allow the Plaintiff to correct any deficiency in its pleadings, because there is simply no factual basis for the Court to have concluded "beyond doubt" the Plaintiff cannot *prove* facts entitling it to pierce the corporate veil.

Additionally, the Plaintiff respectfully requests the Court reverse its decision dismissing the Plaintiff's claim for unjust enrichment against John and Amy Berryhill as the Plaintiff has properly pled this claim. If the Court is going to take the extraordinary measure and dismiss the Plaintiff's claim on the pleadings as it has done, then the Plaintiff requests that the Court at least cite to some authority to support its decision.

DATED this 14th day of September, 2009.

CLARK & ASSOCIATES, ATTORNEYS



---

Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 14th day of ~~July~~<sup>Sept</sup>, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 407

SEP 21 2009

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**MOSELL EQUITIES' MOTION TO  
COMPEL RESPONSES TO  
PLAINTIFF 'S FIRST SET OF  
INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS TO DEFENDANTS**

COMES NOW the Plaintiff and by and through its counsel of record hereby requests the Court enter an Order according to Rule 37(a)(2), IRCP, compelling the Defendants to provide full and complete responses to the Plaintiff's First Set of Discovery served on June 3, 2009 and to which the Defendants have not responded. The Plaintiff, prior to filing this motion, contacted the Defendants' counsel by letter regarding these discovery requests. Defense counsel has not responded. The Plaintiff also seeks an Order according to Rule 37(a)(4), IRCP, directing the Defendants to pay the Plaintiff's costs and attorney fees incurred to bring and pursue this motion.

MOSELL EQUITIES' MOTION TO COMPEL RESPONSES TO PLAINTIFF 'S FIRST SET OF  
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS - 1

000137

The bases for this motion are the above-cited rules along with the facts contained in the Affidavit of Counsel and exhibits filed contemporarily herewith.

RESPECTFULLY SUBMITTED this 21st day of September, 2009.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 21st day of September, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



ERIC R. CLARK

SEP 21 2009

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**AFFIDAVIT OF COUNSEL FILED IN  
SUPPORT OF MOSELL EQUITIES'  
MOTION TO COMPEL RESPONSES  
TO PLAINTIFF 'S FIRST SET OF  
INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS TO DEFENDANTS**

STATE OF IDAHO            )  
                                      ) ss.  
County of Ada             )

Eric R. Clark, first being duly sworn on oath as provided by law, states as follows:

1. I am over eighteen years of age, and I have personal knowledge of the facts  
discussed below.

2. On June 3, 2009, the Plaintiff's process server served the Defendants with a copy  
of the Plaintiff's First Set of Interrogatories and Requests for Production. (A true and correct  
copy is attached as Exhibit A.)

AFFIDAVIT OF COUNSEL FILED IN SUPPORT OF MOSELL EQUITIES' MOTION TO COMPEL  
RESPONSES TO PLAINTIFF 'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION  
OF DOCUMENTS TO DEFENDANTS - 1

000139



3. On July 22, 2009, the Court granted the Defendants' Motion for Protective Order, relieving the Defendants of their duty to respond to this discovery until the Court decided the Defendants' pending Motion to Dismiss.

4. On July 29, 2009, the Court filed its decision dismissing Defendants John and Amy Berryhill.

5. The Plaintiff's counsel did not receive a copy of the Court's decision until September 11, 2009, because the decision was sent to the wrong address.

6. On September 14, 2009, Plaintiff's Counsel sent a letter to Defendants' counsel requesting discovery responses, as the remaining Defendants had an additional 7 weeks after the Court entered its decision to respond. (A true and correct copy is attached as Exhibit B.)

7. In this letter, Plaintiff's counsel requested the Defendants respond by the end of the week, September 18, 2009, giving the Defendants a total of 8 weeks to respond to the Plaintiff's discovery after the Court's decision.

8. As of the date of filing this Motion to Compel, the Defendants have not responded nor has their counsel requested additional time to respond.

9. This motion is necessary as it appears the Defendants are not going to provide responses to the Plaintiff's discovery requests without a Court order.

I declare under penalty of perjury under the laws of the State of Idaho and the laws of the United States, that the foregoing is true and correct to the best of my knowledge and belief.

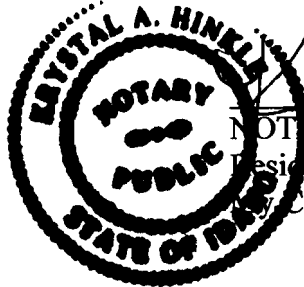
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DATED this 21st day of September, 2009.



Eric R. Clark

SUBSCRIBED AND SWORN to before me this 21st day of September, 2009.



Crystal A. Hinkle  
NOTARY PUBLIC for the State of Idaho  
Residing at: Eagle, Idaho  
Commission expires: November 24, 2014

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 21st day of September, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



ERIC R. CLARK

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. \_\_\_\_\_

**PLAINTIFF 'S FIRST SET OF  
INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS TO DEFENDANTS**

TO: BERRYHILL & COMPANY, INC., JOHN E. BERRYHILL III and AMY BERRYHILL:

The Plaintiff, pursuant to Rules 33 and 34 of the Idaho Rules of Civil Procedure, hereby requests that the Defendants answer and serve written responses, under oath, to the following Interrogatories and Requests for Production of Documents within thirty (30) days from the date of service of these discovery requests.

**PRELIMINARY STATEMENT**

A. When responding to the following Interrogatories and Requests for Production, you are requested to furnish all information available to you, including information in the possession of

PLAINTIFF 'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF  
DOCUMENTS TO DEFENDANTS- 1

**EXHIBIT**   
000142

your attorneys, investigators, employees, agents, representatives, or any other person or persons acting on your behalf, and not merely such information as is known by you on personal knowledge.

B. If you cannot answer any of the following Interrogatories in full after exercising due diligence to secure the information to do so, so state and answer to the extent possible, specifying your inability to answer the remainder, and stating whatever information or knowledge you have concerning the unanswered portions.

C. Each Interrogatory and Request for Production is intended to and does request that each and every, all and singular, and the particulars and parts thereof, be answered with the same force and effect as if each part and particular were the subject of and were asked by a separate Interrogatory or Request for Production.

D. These Interrogatories are deemed continuing and your Answers thereto are to be supplemented, as additional information and knowledge becomes available or known to you.

E. Plaintiff hereby requests that you serve Answers to these Interrogatories within thirty (30) days of the date of service hereof. Plaintiff further requests that you serve Responses to these Requests for Production of Documents and produce each of the documents requested, or in the alternative provide copies of the documents requested, at the offices of Clark & Associates, Attorneys, 776 E. Riverside Drive, Ste. 200, Eagle, Idaho 83616, within thirty (30) days of the date of the service hereof.

F. All of the Requests for Production herein are deemed continuing. If, after responding to these Requests, you acquire any document requested herein, or any information related to any document requested herein which is not reflected by any documents produced or any response to these requests for production, you must file a supplemental response or indicate to counsel for Plaintiff of the existence of such documents. Such supplementation is requested herein in addition to any supplementation required by the Idaho Rules of Civil Procedure.

G. If any document or portion thereof, which is responsive to any request herein, is or will be withheld from production, inspection, or copying, please fully identify such document or portion thereof in your response and fully state in your response the reason it is or will be withheld. In addition, if any document is practically impossible of production, inspection, or copying, please fully identify such document and the reason for the practical impossibility.

#### DEFINITIONS

As used throughout these Interrogatories and Requests for Production:

1. The term "documents" shall mean and include any and all:
  - (a) Tangible things or items, whether handwritten, typed, printed, tape recorded, electronically recorded, videotape recorded, visually reproduced, stenographically reproduced, or reproduced in any other manner;

- (b) Originals and all copies of any and all communications;
- (c) Writings of any kind or type whatsoever;
- (d) Books and pamphlets;
- (e) Microtape, microfilm, photographs, movies, records, recordings, tape recordings, computer disks, and videotape recordings, stenographically or otherwise reproduced;
- (f) Diaries and appointment books;
- (g) Cables, wires, memoranda, reports, notes, minutes, and interoffice communications;
- (h) Letters and correspondence;
- (i) Drawings, blueprints, sketches, and charts;
- (j) Contracts or agreements;
- (k) Other legal instruments or official documents;
- (l) Published material of any kind;
- (m) Vouchers, receipts, invoices, bills, orders, billings, and checks;
- (n) Investigation or incident reports;
- (o) Files and records;
- (p) Notes or summaries of conferences, meetings, discussions, interviews, or telephone conversations or messages;
- (q) Drafts or draft copies of any of the above.

2. The term "identify" when referring to an individual, corporation, or other entity, shall mean to set forth:

- (a) The name;
- (b) Present or last known address;
- (c) Telephone number;
- (d) If a corporation, the principal place of business.

3. The term "identify" when referring to a conversation means to state with respect to that conversation the date, the participants, the place, and the substance of the conversation.

4. The term "identify" when referring to a document shall mean to set forth:

- (a) The name of the document;
- (b) The contents of the document;
- (c) The author of the document;
- (d) The date of the document;
- (e) The document's present location and the name of its custodian.
- (f) The nature and substance of the document with sufficient particularity to enable it to be subpoenaed;
- (g) Whether it will be voluntarily made available for inspection and copying.

In lieu of the identification required by subparts (a) through (f) above, you may attach a legible copy of the document to your answers to these interrogatories if your answer to the particular interrogatory and subpart thereof: (i) is sufficient to enable a reader thereof

to determine which document or documents are referred to by your answer, and (ii) contains all information requested by subparts (a) through (f) above not contained in the document itself.

5. The term "you" and "your" means Defendants, BERRYHILL & COMPANY, INC., JOHN E. BERRYHILL and AMY BERRYHILL, and all or any of your agents, representatives, employees, attorneys, and every person acting or purporting to act, or who has ever acted or purported to act on your behalf. "You" means also the person or persons responding to these requests and "your" refers to the same persons to which "you" refers. If the Plaintiff intends to refer to a specific Defendant or Defendants in a particular request, the Plaintiff will identify that party.

6. "Tangible things" means any object, property, or thing of a corporeal nature which is not otherwise subsumed and included under the term "documents" as hereinabove defined.

7. "Persons" means and includes any natural person, partnership, corporation, joint venture, unincorporated association, governmental entity (or agency or board thereof), quasi-public entity or other form of entity, and any combinations thereof.

8. "Basis of your opinion" refers to your answer to an interrogatory and means a complete statement setting forth the following:

- (a) Each and every fact or matter claimed to be a fact in chronological order which supports or tends to support your answer to an interrogatory;
- (b) The name or other means of identification, present telephone number, and present address of each person who knows or claims to know any such fact or matter claimed to be a fact and the substance of such facts or matters claimed to be a fact which are known or claimed to be known to such person; and
- (c) A complete description of any tangible or physical evidence of any kind which supports or tends to support your answer to an interrogatory together with the name or other means of identification, the present telephone number, and the present address of each person who has custody or possession of the original and of each copy of such original.

Masculine pronouns shall not connote any particular gender but shall be taken to mean masculine, feminine, or neuter gender, as the appropriate case may be. All requests for documents assume that the documents are either in your possession or control as the terms "you" and "your" are defined.

## **INTERROGATORIES**

INTERROGATORY NO. 1: Please identify the date and the amount of any funds you (any Defendant) received from Mosell Equities.

INTERROGATORY NO. 2: Please identify by name, and provide a current address and telephone number for each bookkeeper, accountant, or accounting firm that Defendant BERRYHILL & COMPANY, INC. has used or employed for the last five (5) years.

INTERROGATORY NO. 3: Please identify by name, and provide a current address and telephone number for each bookkeeper, accountant, or accounting firm that Defendants JOHN E. BERRYHILL III and AMY BERRYHILL have used or employed for the last five (5) years.

INTERROGATORY NO. 4: Attached as Exhibit 1 is a letter from Attorney Daniel E. Williams in which Mr. Williams represents "... the relevant funds constituted an investment by Mosell Equities, LLC, in a speculative venture dealing with the proposed development of Polo Cove near Sunnyslope in canyon County, Idaho." Please identify all facts and documents which you assert supports the contention that Mosell Equities' money you received was an "investment" in the Polo Cove project.

INTERROGATORY NO. 5: Referring to the question propounded in the previous interrogatory, provide a complete and detailed accounting of your use of Mosell Equities' money - all \$405,000.00.

INTERROGATORY NO. 6: Referring to the question propounded in Interrogatory No. 4, what happened to Mosell Equities' money after you received it but before you claim you used it for the Polo Cove project? If the money was deposited in any account in a bank or financial institution, please identify the bank or financial institution by name and address, and identify the dates and amounts of any deposits or withdrawals concerning these funds.

INTERROGATORY NO. 7: Referring again to Exhibit 1, and to Mr. Williams' contention as identified in Interrogatory No. 4, please state whether or not the Berryhill & Co. Restaurant currently located in downtown Boise, Idaho, was part of the Polo Cove project.

INTERROGATORY NO. 8: If you answered the previous interrogatory affirmatively, please identify all facts and documents which you claim supports this contention.

INTERROGATORY NO. 9: Referring again to Exhibit 1, Mr. Williams claims, "Over the next many months, Mr. Berryhill devoted substantial time to working on the project, meeting with architects, designers, potential vendors, vintners, hotel developers, as well as other interested parties." Please identify the particular person(s) or firm, and the date, time and location of all Mr. Berryhill's meetings with each:

1. Architect
2. Designer
3. Potential Vendors

4. Vitners
5. Hotel Developers
6. and any other "interested parties."

INTERROGATORY NO. 10: If you contend you paid for any costs, invoices or bills associated with or directly for the "Polo Cove project," please identify the date of the payment, the amount of the payment, the purpose of the payment and the source of the payment funds.

INTERROGATORY NO. 11: Referring again to Exhibit 1, Mr. Williams claims, "A good portion of the funds identified in your letter were dedicated to this buildout." Please identify the total amount of Mosell Equity funds that you "dedicated" to the buildout of the new restaurant. Of these Mosell Equity funds which you dedicated for the buildout, please state the date of the payment, the amount of the payment and identify the payee by individual or business name and provide that individual's or businesses' address providing the material, labor or fixtures for the buildout.

INTERROGATORY NO. 12: Please identify Mosell Equities' ownership interest in Berryhill & Co. Restaurant or in any entity you claim owns this restaurant.

INTERROGATORY NO. 13: Referring again to Exhibit 1, Mr. Williams claims, "Potential investors and other interested parties were wined and dined by Mr. Mosell at the restaurant without charge." Please identify the dates and times for these meetings or dinners and state the costs for the drinks and food that you claim Mr. Mosell and his parties consumed.

INTERROGATORY NO. 14: Referring again to Exhibit 1, Mr. Williams claims, "Part of the funds that Mr. Mosell is now seeking repayment was for attorney fees arising out of this case." Please identify the date, the payee, and the amount of the payment of all attorney fees referenced by Mr. Williams that you made.

INTERROGATORY NO. 15: Referring again to Exhibit 1, Mr. Williams claims, "Over many months of discussions, it was agreed that there would be a joint venture to develop Polo Cove with Mr. Mosell as the 'money' man and Mr. Berryhill as a day-to-day operations man." Please identify what Mr. Berryhill understood would be his responsibilities as a "day-to-day operations man" for the Polo Cove project.

INTERROGATORY NO. 16: Referring to your answer to the previous interrogatory, please identify the education and experience you (John Berryhill) have for the responsibilities listed.

INTERROGATORY NO. 17: Did Defendant John Berryhill receive any money for "consulting" fees from any person or entity associated with the Polo Cove project? If so, state the date, the amount of payment and identify the source of payment.

INTERROGATORY NO. 18: Referring again to Exhibit 1, Mr. Williams claims, "Others involved in Polo Cove started asking Mr. Berryhill about Mr. Mosell, saying he would not return their calls and they had not been paid for their work." Please identify the "others" by name, address and phone number, and state the date and time of the conversation.



INTERROGATORY NO. 19: State the name, address and telephone number of each person you intend to call as a witness at the trial of this matter. With regard to each witness, state the substance of the facts to which you expect the witness to testify.

INTERROGATORY NO. 20: State the name and address of each person whom you expect to call as an expert witness at the trial. According to Rule 26(b)(4), IRCP, and for each such person:

- a) State the subject matter on which the expert is expected to testify;
- b) Provide a complete statement of all opinions to be expressed and the basis and reasons therefore;
- c) Identify the data or other information considered by the witness in forming the opinions;
- d) Provide any exhibits to be used as a summary of or support for the opinions;
- e) Identify any qualifications of the witness, including a list of all publications or documents authored by the witness within the preceding ten years;
- f) Disclose the compensation to be paid for the testimony; and,
- g) List any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

INTERROGATORY NO. 21: Do you intend to introduce any documentary evidence at the trial of this matter? If so, describe each document or exhibit you intend to introduce.

INTERROGATORY NO. 22. Please identify any legal or factual basis for any affirmative defense raised in any responsive pleading.

#### **REQUEST FOR PRODUCTION OF DOCUMENTS**

REQUEST NO. 1: Please produce all documents in your possession which you claim establish the money you received from Mosell Equities was not a loan, but an "investment" in the Polo Cove project.

REQUEST NO. 2: Please produce copies of bank or financial institution records memorializing the dates and amounts of any deposits or withdrawals you made regarding Mosell Equities' funds.

REQUEST NO. 3: Please produce all documents which you claim supports your contention that Berryhill & Co. Restaurant currently located in downtown Boise, Idaho, was part of the Polo Cove project.

REQUEST NO. 4: Regarding your response to Interrogatory No. 9, please provide all documents to support your contention John Berrhyll "devoted substantial time working on the [Polo Cove] project."

REQUEST NO. 5: Regarding your response to Interrogatory No. 10, please provide copies of all costs, invoices or bills associated with or directly for the Polo Cove project. If you paid these costs, invoices, or bills, please provide evidence proving payment, including copies of checks.

REQUEST NO. 6: Regarding your response to Interrogatory No. 11, please provide copies of all documents relating to the costs for the buildout for the restaurant.

REQUEST NO. 7: Please provide any documents that you claim in any manner support your response to Interrogatory No. 13.

REQUEST NO. 8: Please provide any documents that you claim in any manner evidence payments you made for any legal services regarding the Polo Cover Project or any other litigation you claim involved Glenn Mosell, Mosell Equities and any of the Defendants as parties.

REQUEST NO. 9: Please provide any documents that you claim in any manner support your response to Interrogatory No. 15.

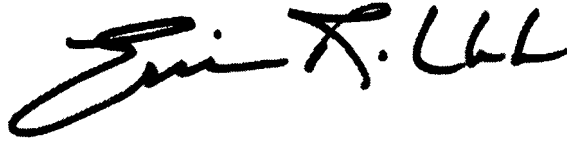
REQUEST NO. 10: Please provide any documents that you claim in any manner support your response to Interrogatory No. 17.

REQUEST NO. 11: Please produce all exhibits that you may utilize at any trial or hearing in this matter.

REQUEST NO. 12: Please produce a copy of the current Berryhill & Company lease, the Letter of Intent Mr. Williams identifies in Exhibit 1, and any other documents you contend establish the terms of the current Berryhill & Company lease.

DATED this 27th day of May, 2009.

CLARK & ASSOCIATES, ATTORNEYS

A handwritten signature in black ink, appearing to read "Eric R. Clark". The signature is fluid and cursive, with the first name "Eric" written in a large, sweeping script, followed by "R." and "Clark".

---

Eric R. Clark  
For the Plaintiff



THOMAS, WILLIAMS  
& PARK

April 2, 2009

**VIA TELEFAX: 938-9504 & U.S. MAIL**

Paul R. Mangiantini  
Mangiantini & Slomiak, LLP  
1191 E. Iron Eagle Dr., Suite 200  
Eagle, Idaho 83616

RE: Glenn Mosell

Dear Paul:

I'm writing in response to your letter of February 20, 2009. There are a number of inaccuracies and mischaracterizations in that correspondence, which I will respond to for you.

First and foremost, the funds described in your letter and claimed by Mr. Mosell or Mosell Equities, LLC, did not constitute a loan to John Berryhill or Berryhill & Co., Inc. ("Berryhills" or "Berryhill & Co."). I believe you will find no note, no security terms, no repayment terms, no interest rate, nor any of the other specific terms necessary in order to sustain the concrete requisites of a *bona fide* loan. Rather, despite the parties' inability to come to terms on any particular written contractual relationship, you will find that the extensive course of dealing indicates that the relevant funds constituted an investment by Mosell Equities, LLC, in a speculative venture dealing with the proposed development of Polo Cove near Sunnyslope in Canyon County, Idaho.

Apparently, Mr. Mosell is a developer and was interested in pursuing the Polo Cove project. He first contacted John Berryhill in approximately July of 2005 to ask him if he would put a restaurant in the development. Over many months of discussions, it was agreed that there would be a joint venture to develop Polo Cove with Mr. Mosell as the "money" man and Mr. Berryhill as a day-to-day operations man. Over the next many months, Mr. Berryhill devoted substantial time to working on the project, meeting with architects, designers, potential vendors, vintners, hotel developers, as well as other interested parties. Mr. Mosell constantly assured Mr. Berryhill that he would "take care of" Mr. Berryhill and that they would get "everything in writing". The roughly three years worth of emails and other documents in the possession of your client substantiate the enormous amount of time Mr. Berryhill devoted to this venture, for which he was not paid.

April 2, 2009  
Page 2

At that time, Berryhill & Co. operated a restaurant at the Broadway Park Shopping Center in Boise. As part of the Polo Cove venture, Mr. Mosell eventually insisted that Mr. Berryhill move the restaurant to downtown to a site that would impress people he wanted to interest in Polo Cove, in addition to planning a new restaurant at the Polo Cove site. Mr. Mosell wanted to "splash the pot." Mr. Berryhill made it very clear that the move was too big a financial step for him to take on himself. Mr. Mosell represented that he was not going anywhere, that together they had "big things" to do. Throughout the construction of the new Berryhills restaurant Mr. Mosell told Mr. Berryhill not to "cheap out," not to worry about the cost of the buildout, "go big," "do it sexy." A good portion of the funds identified in your letter were dedicated to this buildout.

Potential investors and other interested parties were wine and dined by Mr. Mosell at the restaurant without charge. Mr. Mosell signed a letter of intent with Tomlinson & Associates for additional space on the ground floor of the same downtown building near the restaurant for a Polo Cove showroom, although Mr. Berryhill advised him it was too big. Mr. Berryhill told Mr. Mosell that this addition would considerably increase their liabilities. Mr. Mosell responded that Mr. Berryhill was not looking at "the big picture." Mr. Mosell could use the space for Polo Cove promotions in the day and Berryhills could use it for banquet and reception facilities in the evening. Mr. Mosell ordered expensive furniture for the space and Berryhills had to cover the remaining half of the cost of this furniture upon delivery. Berryhills is still being charged rent for this additional space.

Mr. Mosell began paying his rent for the promotional area at later and later times each month and had not paid for Polo Cove's portion of the buildout. Then the Polo Cove meetings stopped. Potential investors stopped coming to the restaurant. Others involved in Polo Cove started asking Mr. Berryhill about Mr. Mosell, saying he would not return their calls and they had not been paid for their work. The funds identified in your letter included some amounts paid to attorneys to draft contracts between Berryhill & Co., Inc., and Mosell Equities, LLC, which were not executed. It is my understanding that an amount owed to attorney Kim Gourley is still unpaid.

You will also note that earlier Kim Gourley started out representing both Mosell Equities, LLC, and Mr. Berryhill as co-buyers in a lawsuit arising from a Purchase and Sale Agreement relating to the Broadway Park Shopping Center, where Berryhills then was located (Mr. Gourley was later replaced). At Mr. Mosell's urging, litigation was initiated, which was unsuccessful. Part of the funds that Mr. Mosell is now seeking repayment was for attorney fees arising out of this case.

April 2, 2009

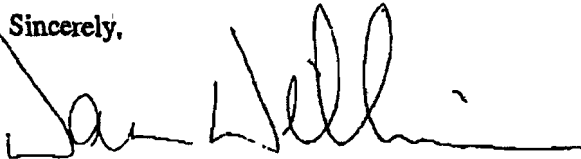
Page 3

Although it is true that certain documents reference "loans" by either Glen Mosell or Mosell Equities, Inc., you will find that the "loan" label was attached because of instructions from Mr. Mosell himself to Berryhills' bookkeeper without Mr. Berryhill's involvement. As such, they represent nothing more than a label that Mr. Mosell unilaterally applied to the funds.

If we calculate the additional costs for which Mr. Berryhill is responsible, including increased rent, buildout of additional space, as well as the enormous contribution of time expended by Mr. Berryhill in the Polo Cove venture, the Berryhills contribution exceeds that identified by Mr. Mosell. Moreover, without Mr. Mosell's inducements into the Polo Cove venture, Berryhills would still be operating at Broadway with much reduced expenses and attendant risk. Because of Mr. Mosell's inducements and representations, Berryhills is responsible for much greater operating expenses in a very challenging environment for restaurants.

In short, Mr. Mosell is now asking John Berryhill or Berryhill & Co. to refund a good part of his speculative investment in Polo Cove, as if Berryhills was a guarantor of that investment. Based on the course of dealing between the parties, it is clear that Berryhills was no such guarantor or borrower. We believe that, after an exhaustive review of the course of dealing involved here over three years, a jury will find that there were no "loans." Accordingly, we must decline your client's invitation to reimburse him for his own investment in this failed venture.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Williams", with a long horizontal line extending to the right.

Daniel E. Williams

DEW:g

# CLARK & ASSOCIATES, ATTORNEYS

Real Estate • Business • Litigation

---

September 14, 2009

**Via Facsimile: (208) 345-7894**

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St. 300  
P.O. Box 1776  
Boise, ID 83701

Re: *Mosell Equities v. Berryhill & Co, et al.* Discovery

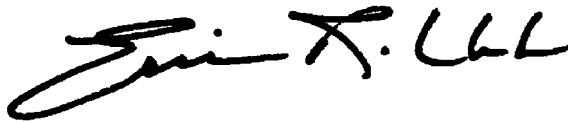
Dear Dan:

Thank you for providing me with a copy of the Judge's decision. I will file a motion for clarification and to reconsider later today.

Regarding the outstanding discovery, we initially submitted discovery to you in May, 2009. While the judge did grant your motion for a protective order, my understanding was that order stayed your duty to respond until the Judge rendered her decision. Considering it has been seven weeks since the decision, you should have had more than enough time to complete your responses. Please provide your responses no later than Friday, September 18, 2009.

This letter will serve as the Plaintiff attempt to meet and confer according to Rule 37(a)(2), IRCP.

Sincerely,



Eric R. Clark

cc: Mosell Equities, LLC

---

776 E. Riverside Drive, Suite 200  
P.O. Box 2504  
Eagle, Id 83616

(208) 685-2320  
Fax: (208) 939-7136  
ecclark@Clark-Attorneys.com

EXHIBIT

**B**

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TIME RECEIVED

September 22, 2009 10:52:23 AM MDT

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208 939-7136

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Sent by: CLARK & ASSOCIATES, ATTORNEYS

208 939-7136

9/22/2009 10:51:05 AM

Page 1 of 2

**ORIGINAL**

NO. \_\_\_\_\_  
A.M. 11 FILED P.M. \_\_\_\_\_

SEP 22 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF HEARING RE:  
MOSELL EQUITIES' MOTION TO  
COMPEL RESPONSES TO PLAINTIFF'S  
FIRST SET OF  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION OF DOCUMENTS  
TO DEFENDANTS

TO: ABOVE NAMED DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, October 14, 2009, at 2:45 p.m., or as  
soon thereafter as counsel can be heard, Plaintiff will call up for hearing MOSELL EQUITIES'  
MOTION TO COMPEL DISCOVERY AND REQUEST FOR COSTS AND ATTORNEY

NOTICE OF HEARING RE: PLAINTIFF'S MOTION TO COMPEL DISCOVERY - 1

000155



FEES before the Honorable Darla Williamson, District Judge, at the Ada County Courthouse,  
Boise, Idaho.

RESPECTFULLY SUBMITTED this 22nd day of September, 2009.

CLARK & ASSOCIATES, ATTORNEYS



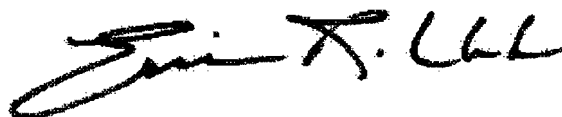
---

Eric R. Clark

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22nd day of September, 2009, I served the foregoing,  
by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



---

ERIC R. CLARK

# ORIGINAL

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
 121 N. 9<sup>th</sup> St., Suite 300  
 P. O. Box 1776  
 Boise, ID 83701  
 Telephone (208) 345-7800  
 Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

### Attorneys for Defendants

NO. \_\_\_\_\_  
A.M. 8:30 FILED \_\_\_\_\_ P.M. \_\_\_\_\_

SEP 28 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

**MOSELL EQUITIES, an Idaho Limited,  
Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho corporation, JOHN E. BERRYHILL III and AMY BERRYHILL, individually, and as husband and wife.**

**Defendants.**

**Case No. CV OC 0909974**

**AFFIDAVIT OF  
DANIEL E. WILLIAMS RE:  
RENEWED MOTION FOR  
PROTECTIVE ORDER**

STATE OF IDAHO     )  
                              )ss.  
County of Ada         )

**DANIEL E. WILLIAMS**, being first duly sworn on oath, deposes and says:

1. He is one of the attorneys for Defendants in the above-captioned matter.

AFFIDAVIT OF DANIEL E. WILLIAMS RE: RENEWED MOTION FOR  
PROTECTIVE ORDER, P. 1

2. Attached as Exhibit A to the earlier Affidavit of Daniel E. Williams Re: Motion for Protective Order is a copy of the voluminous discovery requests at issue.

3. The Court granted Defendants' original motion for protective order so that Defendants were not required to respond to Plaintiff's discovery requests until after the Court had a chance to rule on Defendants' original motion to dismiss.

4. After this Court ruled on Defendants' motion to dismiss and, *inter alia*, dismissed the claims against the individual Defendants John E. Berryhill III and Amy Berryhill ("the individual defendants") on July 28, 2009, Plaintiff moved for reconsideration on September 14, 2009. Plaintiff has also filed an amended complaint which again includes the same claims against the individual defendants.


5. For similar reasons as accepted by the Court in granting Defendants' original motion for protective order, this Court should grant Defendants' current renewed motion for protective order. Defendants should have the opportunity to respond to Plaintiff's motion for reconsideration and obtain the Court's ruling on a second motion to dismiss regarding the Amended Complaint prior to being required to respond to Plaintiff's discovery requests. Plaintiff's discovery requests are directed at the individual defendants, as well as Berryhill & Company, Inc. Especially given the Court's earlier ruling in its Memorandum Decision and Order on Defendant's Motion to Dismiss dated July 28, 2009, there is significant question as to whether the claims against the individual Defendants will survive. Accordingly, prior to being subject to discovery requests, Defendants should have the opportunity to seek the Court's

decision on a second motion to dismiss, particularly when Plaintiff's amended complaint is so fraught with problems.



Daniel E. Williams

Subscribed and sworn to before me this 24<sup>th</sup> day of September, 2009.



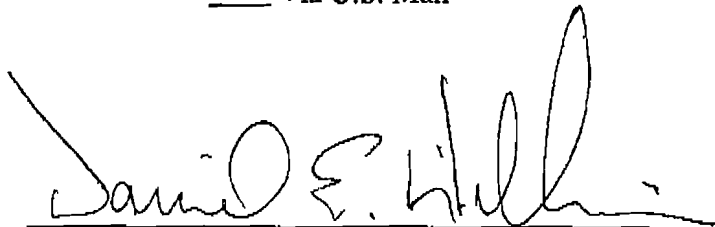
Notary Public for Idaho  
Residing at Boise, Idaho  
My Commission Expires: 11-7-12

#### CERTIFICATE OF SERVICE

I hereby certify that on this 25<sup>th</sup> day of September, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☐ Via U.S. Mail



Daniel E. Williams

AFFIDAVIT OF DANIEL E. WILLIAMS RE: RENEWED MOTION FOR  
PROTECTIVE ORDER, P. 3

TIME RECEIVED September 29, 2009 2:29:32 PM MDT	REMOTE CSID 208 939-7136	DURATION 89	PAGES 2	STATUS Received
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# ORIGINAL

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AM. \_\_\_\_\_ FILED PM 3:15

SEP 29 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF HEARING RE:  
MOSELL EQUITIES' MOTION TO  
RECONSIDER THE COURT'S  
DISMISSAL OF DEFENDANTS JOHN  
AND AMY BERRYHILL

TO: ABOVE NAMED DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, October 14, 2009, at 2:45 p.m., or as  
soon thereafter as counsel can be heard, Plaintiff will call up for hearing MOSELL EQUITIES'  
MOTION TO RECONSIDER THE COURT'S DISMISSAL OF DEFENDANTS JOHN AND

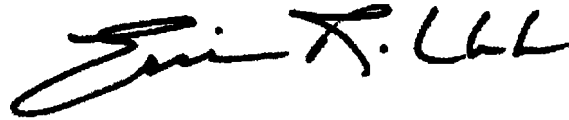
NOTICE OF HEARING RE: MOSELL EQUITIES' MOTION TO RECONSIDER THE COURT'S  
DISMISSAL OF DEFENDANTS JOHN AND AMY BERRYHILL - 1

OP

AMY BERRYHILL before the Honorable Darla Williamson, District Judge, at the Ada County Courthouse, Boise, Idaho.

RESPECTFULLY SUBMITTED this 29th day of September, 2009.

CLARK & ASSOCIATES, ATTORNEYS



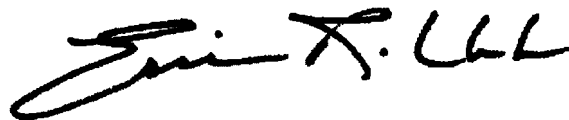
---

Eric R. Clark

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 29th day of September, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



---

ERIC R. CLARK

NOTICE OF HEARING RE: MOSELL EQUITIES' MOTION TO RECONSIDER THE COURT'S  
DISMISSAL OF DEFENDANTS JOHN AND AMY BERRYHILL - 2

TIME RECEIVED  
October 6, 2009 3:50:26 PM MDT

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170

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10/6/2009 3:47:48 PM

Page 1 of 3

A.M.

OCT 06 2009

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**OBJECTION TO THE DEFENDANTS'  
RENEWED MOTION FOR  
PROTECTIVE ORDER**

Judge Darla Williamson

COMES NOW the Plaintiff and by and through its counsel of record hereby objects to  
the Defendants' Renewed Motion for Protective Order.

**ARGUMENT**

**1. OBJECTION TO THE AFFIDAVIT OF DANIEL E. WILLIAMS RE:  
RENEWED MOTION FOR PROTECTIVE ORDER.**

While titled an "affidavit," the primary content of the document is argument. Mr.  
Williams merely recites the procedural history in paragraphs 1-4, and then presents his argument  
in paragraph 5. As argument is not permissible in an affidavit, the Court must sustain this

000162

OBJECTION TO THE DEFENDANTS' RENEWED MOTION FOR PROTECTIVE ORDER - 1

act

objection and disregard Mr. William's document.

**2. THERE IS NO LEGAL OR FACTUAL BASIS TO DELAY DISCOVERY AGAINST DEFENDANT BERRYHILL & COMPANY, INC.**

The Defendants appear to claim that due to a procedural battle with SOME of the Defendants, the Court should stay ALL discovery, even against Berryhill & Company, Inc. the Defendant to which the Court's earlier decision did not apply. Notwithstanding the ongoing procedural battle, however, the Plaintiff is clearly entitled to pursue discovery against Berryhill & Company, Inc. the remaining Defendant.

Mr. Williams indicates in his affidavit that he intends to file a second motion to dismiss, and again attack the pleadings as applied the Berryhill's individually. While the Berryhill's are welcome to do so, Defendant Berryhill & Company, Inc. fails in its burden to present argument, procedural rule, substantive law, or facts to support its contention that ALL discovery should cease against ALL defendants, while the Berryhill's pursue their motion.

The Plaintiff submitted Discovery to the Defendants in June 2009, and that discovery was outstanding regarding Berryhill & Company, Inc., the remaining Defendant for two months after the Court entered its Decision in July. During these two months, Berryhill & Company, Inc. made absolutely no effort to respond to the discovery directed to it, and now seeks its motion for protective order based on the Plaintiff's recent filing of a motion to reconsider – a motion that has nothing to do with the Defendant Berryhill & Company, Inc. or the claims against it.

The Defendant's ongoing refusal to respond to discovery suggests rather loudly the Defendants do not want to disclose Berryhill & Company, Inc. documents because that evidence will support and confirm the Plaintiff's contention there is such a unity of interests and ownership the separate personalities of the Berryhills as individuals and Berryhill & Company, Inc. as a separate corporate entity no longer exist. If that were not the case, it would seem that



the Defendants would gladly provide the requested information from Berryhill & Company, Inc.?

### CONCLUSION

The Plaintiff is confident that the Court will deny any additional motions to dismiss filed by John and Amy Berryhill, and while these Defendants are certainly entitled to file their motions, the Plaintiff is also entitled to pursue discovery from Berryhill & Company, Inc. The Plaintiff therefore requests that the Court deny the Defendants' Motion for Protective Order as it applies to Berryhill & Company, Inc. Once the Court decides the pending issues against the Berryhills, then the Plaintiff will renew its discovery requests against them.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of October, 2009.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6<sup>th</sup> day of October, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



ERIC R. CLARK



### ARGUMENT

Plaintiff has filed a motion to reconsider regarding the Court's dismissal of Defendants John and Amy Berryhill and Count 5 of the original complaint by its Memorandum Decision and Order on Defendant's Motion to Dismiss of July 28, 2009 ("Memorandum Decision").

Apparently, Plaintiff is concerned that the dismissal was with prejudice and argues that, if it was, the Court should reconsider.<sup>1</sup> Plaintiff then goes on to argue that, in various ways, the Court misconstrued certain elements and pleading standards in its Memorandum Decision<sup>2</sup>

If the Court intended the dismissal to be with prejudice, Defendants oppose Plaintiff's motion to reconsider. Under the very similar standard under the federal rules, a motion to reconsider an interlocutory ruling requires an analysis of two principles: (1) Error must be corrected; and (2) Judicial efficiency demands forward progress. *See, e.g., Vonbrethorst v. Washington County*, 2008 U.S. Dist. LEXIS 61816, \*2 (August 12, 2008) (J. Lodge). The need to be right must co-exist with the need for forward progress. *Ibid.*

A court's opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Ibid*, quoting, *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D.Ill. 1998). "Courts have distilled various grounds for reconsideration of prior rulings into three major grounds for justifying reconsideration: (1) an

---

<sup>1</sup> Plaintiff's Motion to Reconsider the Court's Dismissal of Defendants John and Amy Berryhill, p. 2.

<sup>2</sup> Memorandum in Support of Plaintiff's Motion to Reconsider the Court's Dismissal of Defendants John and Amy Berryhill, p.2-3.

intervening change in controlling law; (2) the availability of new evidence or an expanded factual record; and (3) need to correct a clear error or to prevent manifest injustice." *Ibid, quoting.*

*Louen v. Twedt*, 2007 U.S. Dist. LEXIS 25906 (E.D. Cal. March 26, 2007).

Under similar Idaho state procedure, the focus is on new facts that may affect the correctness of an earlier interlocutory order:

When considering a motion of this type [an interlocutory order under Rule 11(a)(2)(B)], the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. The burden is on the moving party to bring the trial court's attention to the new facts. We will not require the trial court to search the record to determine if there is any new information that might change the specification of facts deemed to be established.

*Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823, 800 P.2d 1026 (1990).

Defendants submit that Plaintiff has pointed to no new or even additional facts bearing on the Court's original ruling, no change in controlling law, and no clear error or manifest injustice. Under any conceivable standard for reconsideration, Defendant has simply failed to do anything other than repeat with some additional case authority the very same arguments made earlier.

If the Court intended the dismissal of the individual defendants to be without prejudice, Plaintiff's motion is indeed moot. Plaintiff has filed an amended complaint attempting to resurrect theories of individual liability against John and Amy Berryhill. As Defendants indicated in their Renewed Motion for Protective Order, they anticipate that the Court may consider the sufficiency of these latest efforts in a second motion to dismiss, once the amended complaint is served. Obviously, Plaintiff does not get infinite bites at the apple. Defendants' second motion to dismiss will specifically seek dismissal with prejudice.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S  
MOTION TO RECONSIDER, P. 3

DATED this 7<sup>th</sup> day of October, 2009.

THOMAS, WILLIAMS & PARK, LLP



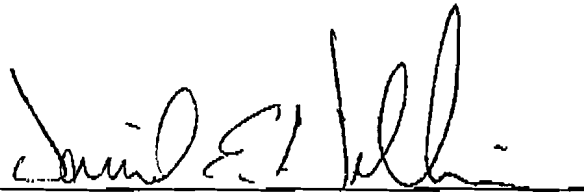
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> day of October, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☐ Via U.S. Mail



Daniel E. Williams

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S  
MOTION TO RECONSIDER, P. 4

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83

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Page 1 of 2

**ORIGINAL**

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A.M.

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P.M.

OCT 15 2009

J. DAVID NAVARRO, Clerk  
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DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF SERVICE OF  
AMENDED COMPLAINT  
AND  
DEMAND FOR JURY TRIAL

Judge Williamson

\*\*\*\*\*

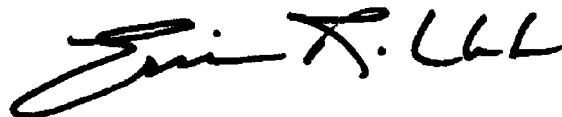
COMES NOW the Plaintiff and by and through its attorney of record and hereby files its  
Notice of Service of Amended Complaint and Demand for Jury Trial. The Plaintiff served a  
copy of the Amended Complaint, filed on September 14, 2009, upon the respective defendants  
through their attorney of record and according to Rules 5(a) & (b), IRCP by facsimile  
transmission on this date.

NOTICE OF SERVICE OF AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 1

000169

DATED this 15th day of October 2009.

CLARK & ASSOCIATES, ATTORNEYS



---

Eric R. Clark,  
For the Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of October, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK

**ORIGINAL**

DANIEL E. WILLIAMS (ISB 3920)  
 THOMAS, WILLIAMS & PARK, LLP  
 121 N. 9<sup>th</sup> St., Suite 300  
 P. O. Box 1776  
 Boise, ID 83701  
 Telephone (208) 345-7800  
 Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants

NO. \_\_\_\_\_  
 AM. \_\_\_\_\_ FILED P.M. 2:55

OCT 29 2009

J. DAVID NAVARRO, Clerk  
 By KATHY J. BIEHL  
 DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
 Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
 corporation, JOHN E. BERRYHILL III and  
 AMY BERRYHILL, individually, and as  
 husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF HEARING ON  
 DEFENDANTS' SECOND  
 MOTION TO DISMISS

TO: PLAINTIFF AND ITS ATTORNEYS OF RECORD

Defendants Berryhill & Company, Inc., John E. Berryhill III and Amy Berryhill, by and  
 through their attorneys of record, Thomas, Williams & Park, LLP, will bring on for hearing

NOTICE OF HEARING ON DEFENDANTS' SECOND MOTION TO DISMISS, P. 1

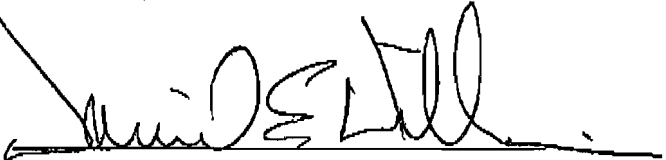
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before this Court on the 2nd day of December, 2009, at 2:45 p.m., their Second Motion to Dismiss.

DATED this 29<sup>th</sup> day of October, 2009.

THOMAS, WILLIAMS & PARK, LLP



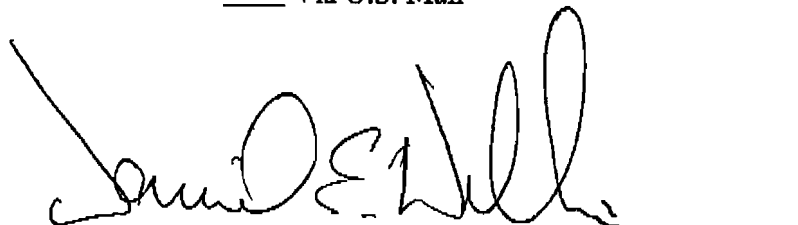
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of October, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☐ Via U.S. Mail



Daniel E. Williams

NOTICE OF HEARING ON DEFENDANTS' SECOND MOTION TO DISMISS, P. 2

**ORIGINAL**

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
 121 N. 9<sup>th</sup> St., Suite 300  
 P. O. Box 1776  
 Boise, ID 83701  
 Telephone (208) 345-7800  
 Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants

NO. \_\_\_\_\_  
 AM. \_\_\_\_\_ FILED P.M. 1:04

NOV 03 2009

J. DAVID NAVARRO, Clerk  
 By KATHY J. BIEHL  
 DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,  
 Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho  
 corporation, JOHN E. BERRYHILL III and  
 AMY BERRYHILL, individually, and as  
 husband and wife,**

**Defendants.**

Case No. CV OC 0909974

**DEFENDANTS' SECOND  
 MOTION TO DISMISS**

Defendants Berryhill & Company, Inc., John E. Berryhill III and Amy Berryhill, by and through their attorneys of record, Thomas, Williams & Park, LLP, pursuant to Rule 12(b)(6), I.R.C.P., hereby move the Court for its Order dismissing John E. Berryhill III and Amy Berryhill from all counts and Counts Five and Six against Berryhill & Company, Inc., as set forth in


DEFENDANTS' SECOND MOTION TO DISMISS, P. 1

000173

Plaintiff's Amended Complaint. Defendants state that they desire to file a brief in support of this motion and will do so in conformance with Rule 7(b)(3)(E), I.R.C.P. Defendants further state that they desire to present oral argument and refer to their Notice of Hearing on Defendants' Second Motion to Dismiss filed with the Court on October 29, 2009.

DATED this 3<sup>rd</sup> day of November, 2009.

THOMAS, WILLIAMS & PARK, LLP

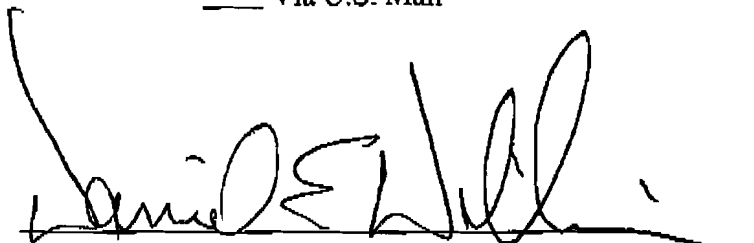
  
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of November, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

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Daniel E. Williams

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Page 1 of 2

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AM. \_\_\_\_\_ FILED PM 12

NOV 03 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL,  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**THREE DAY NOTICE OF INTENT  
TO TAKE DEFAULT AND  
DEFAULT JUDGMENT**

Judge Williamson

COMES NOW the Plaintiff, by and through its attorney of record, and hereby informs the  
Defendants and their Counsel of Record that the Plaintiff will file a default and seek a default  
judgment against these Defendants according to Rule 55(a)(1), IRCP, without further notice.  
The Plaintiff served the Defendants with the Amended Complaint on October 15, 2009. Rule 15,

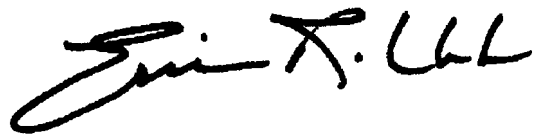
THREE-DAY NOTICE OF INTENT TO TAKE DEFAULT - 1

000175

IRCP requires the Defendants to have responded within 10 days after service of the Amended Complaint. The Plaintiff had agreed to allow the Defendants 20 days to respond, but recently the Defendants indicated they did not intend to file a response within the 20-day deadline. Consequently, the Plaintiff now files this Notice and will move for default and default judgment unless these Defendants file a responsive pleading or other appropriate response within 3 days of receipt of this Notice or no later than November 6, 2009.

RESPECTFULLY SUBMITTED this 3rd day of November, 2009.

CLARK & ASSOCIATES, ATTORNEYS



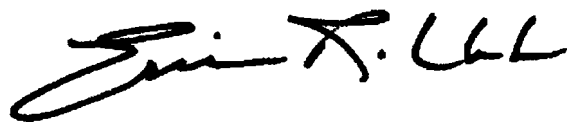
---

Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 3rd day of November, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK

NOV 06 2009

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

MOTION TO STRIKE THREE  
DAY NOTICE OF INTENT  
TO TAKE DEFAULT AND  
DEFAULT JUDGMENT

Defendants Berryhill & Company, Inc., John E. Berryhill III and Amy Berryhill, by and  
through their counsel of record, pursuant to Rule 55(a)(1), 12(b)(6) and Rule 7(b)(3)(E), hereby  
move the Court to strike Plaintiff's Three Day Notice of Intent to Take Default and Default

MOTION TO STRIKE THREE DAY NOTICE OF INTENT TO TAKE DEFAULT  
AND DEFAULT JUDGMENT, P. 1

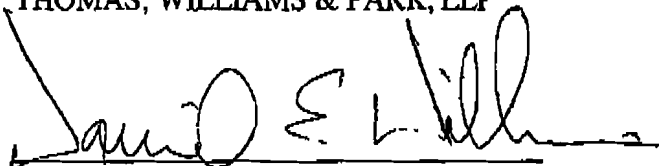
**ORIGINAL**

000177

Judgment, filed by Plaintiff on November 3, 2009. Defendants further rely on their Memorandum in Support of Defendants' Motion to Strike Three Day Notice of Intent to Take Default and Default Judgment, and Affidavit of Daniel E. Williams Re: Motion to Strike, filed concurrently.

DATED this 6<sup>th</sup> day of November, 2009.

THOMAS, WILLIAMS & PARK, LLP



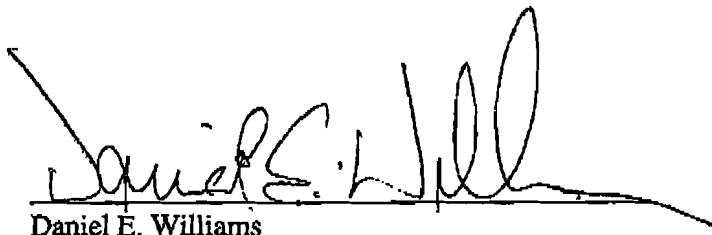
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 6<sup>th</sup> day of November, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 685-2321  
☐ Via U.S. Mail



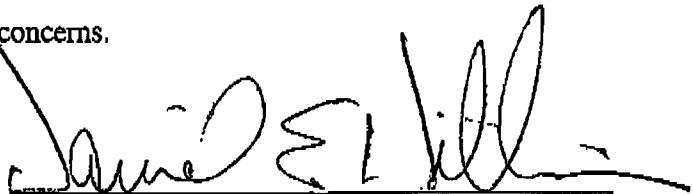
Daniel E. Williams

MOTION TO STRIKE THREE DAY NOTICE OF INTENT TO TAKE DEFAULT  
AND DEFAULT JUDGMENT, P. 2





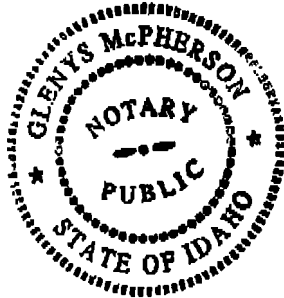
1. I am the attorney of record for Defendants in this action and have personal knowledge of the facts and other matters set forth herein.
2. Attached as Exhibit A is a letter dated October 29, 2009, in which I alerted Plaintiff's counsel of the reason for the postponement of the hearing on Defendants' Second Motion to Dismiss and enclosed the Amended Notice of Hearing.
3. Afterward, I received a telefax from Plaintiff's counsel requesting the Notice of Hearing in the conflicting case, presumably in order to verify that I had a conflict. I replied by telefax to Plaintiff's counsel and indicated the case name and number of the federal case in which I had a conflict with the Court's original proposed hearing date in this case and suggested he check the federal PACER system.
4. Attached as Exhibit B is a letter I sent to Plaintiff's counsel explaining that Defendants would follow Rule 7(b)(3)(E) in filing a supporting memorandum for their Second Motion to Dismiss.
5. Attached as Exhibit C is a letter dated November 3, 2009, I received from Plaintiff's counsel in response enclosing Plaintiff's Three Day Notice of Intent to Take Default and Default Judgment.
6. At no time did Plaintiff's counsel contact me regarding alternative briefing schedules or to discuss any other legitimate concerns.



Daniel E. Williams

AFFIDAVIT OF DANIEL E. WILLIAMS RE: MOTION TO STRIKE THREE DAY NOTICE OF INTENT TO TAKE DEFAULT AND DEFAULT JUDGMENT, P. 2

Subscribed and sworn to before me this 6<sup>th</sup> day of November, 2009.



Glenys McPherson  
 Notary Public for Idaho  
 Residing at Boise, Idaho  
 My Commission Expires: 11-7-12

CERTIFICATE OF SERVICE

I hereby certify that on this 6<sup>th</sup> day of November, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
 Clark & Associates, Attorneys  
 P. O. Box 2504  
 Eagle, ID 83616

☒ Via Hand Delivery  
☒ Via Facsimile: 685-2321  
☒ Via U.S. Mail

Daniel E. Williams  
 Daniel E. Williams

AFFIDAVIT OF DANIEL E. WILLIAMS RE: MOTION TO STRIKE THREE DAY NOTICE  
 OF INTENT TO TAKE DEFAULT AND DEFAULT JUDGMENT, P. 3



THOMAS, WILLIAMS  
& PARK

October 29, 2009

Via Facsimile: 939-7136

Eric R. Clark  
Clark & Assoc.  
P. O. Box 2504  
Eagle, ID 83616

RE: Mosell Equities v. Berryhill & Company, et al.  
Case No. CV OC 0909974

Dear Eric:

Enclosed is a Notice of Hearing on Defendants' Second Motion to Dismiss.

As you will recall, the Court suggested a hearing date of November 18, 2009, but upon my return to my office, I discovered I had a summary judgment hearing in Federal Court that same afternoon. I called Judge Williamson's clerk and this was the earliest hearing date she could give me.

Sincerely,

Daniel E. Williams

DEW:g

Enc.



THOMAS, WILLIAMS  
& PARK

November 2, 2009

Via Fax: 939-7136

Eric R. Clark  
Clark & Associates  
P. O. Box 2504  
Eagle, ID 83616

RE: Mosell Equities v. Berryhill & Company, Inc.

Dear Eric:

As you know, the briefing schedule on Defendant's Second Motion to Dismiss that we discussed with the Court anticipated a hearing date on November 18. Since we are now delayed until December 2, 2009, we will file our motion and briefing by November 18, 2009, in conformance with Rule 7(b)(3)(A), I.R.C.P.

In the meantime, we are working on our discovery responses. I wanted to make sure you were aware of the enclosed document (Personal Guaranty signed 4/12/07 by John Berryhill and Glenn Mosell), which will be part of our production.

Sincerely,

Daniel E. Williams

DEW:g

Enc.

EXHIBIT

## CLARK & ASSOCIATES, ATTORNEYS

Real Estate • Business • Litigation

---

November 3, 2009

Via Facsimile: (208) 345-7894

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St. 300  
P.O. Box 1776  
Boise, ID 83701

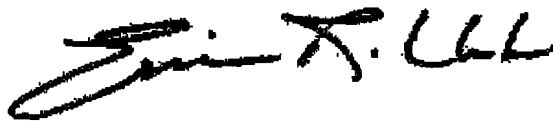
Re: *Mosell Equities v. Berryhill & Co, et al.*: Notice of Intent to Take Default.

Dear Dan:

We filed our amended complaint on October 15, 2009. Consequently, you were required by Rule 15 to file a response within 10 days. During the recent hearing, you indicated you wanted 20 days, so we agreed. As you know, the date of any pending hearing is irrelevant to the Defendants' duty to timely comply with Rule 15. Based upon your November 2, 2009 letter in which you indicate you will not be filing any response until November 18, 2009, well beyond the time set by Rule 15, or as we agreed, we have filed the attached 3-day Notice of Intent to Take Default.

Regarding the personal guarantee; yes, I have a copy, but I'm not sure of the relevance to support any of Berryhill's defenses. Are you providing the guarantee because Berryhill is in breach of the lease?

Sincerely,



Eric R. Clark

cc: Mosell Equities, LLC

EXHIBIT C

---

776 E. Riverside Drive, Suite 200  
P.O. Box 2504  
Eagle, Id 83616

(208) 685-2320  
Fax: (208) 939-7136  
eclark@Clark-Attorneys.com

000184

NOV 06 2009

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,  
Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**MEMORANDUM IN SUPPORT  
OF DEFENDANTS' MOTION  
TO STRIKE THREE DAY  
NOTICE OF INTENT TO TAKE  
DEFAULT AND DEFAULT  
JUDGMENT**

Defendants Berryhill & Company, Inc., John E. Berryhill III and Amy Berryhill, by and through their counsel of record, pursuant to Rule 55(a)(1), 12(b)(6) and Rule 7(b)(3)(B), hereby provide their Memorandum in Support of Defendants' Motion to Strike three Day Notice of

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE THREE  
DAY NOTICE OF INTENT TO TAKE DEFAULT AND DEFAULT JUDGMENT, P. 1**

Intent to Take Default and Default Judgment, filed by Plaintiff on November 3, 2009.

Defendants further rely on the Affidavit of Daniel E. Williams Re: Motion to Strike Plaintiff's Three Day Notice of Intent to Take Default and Default Judgment, filed concurrently.

### ARGUMENT

At the recent hearing on Plaintiff's motion to compel and Defendants' motion for protective order on October 14, 2009, at the Court's suggestion the parties agreed that Defendants could have twenty (20) days to file their Second Motion to Dismiss regarding Plaintiff's Amended Complaint. The Court set a hearing date of November 18, 2009, at 2:45 p.m., although since Defendants' counsel did not have his calendar, the Court specifically indicated that counsel could contact the Court if there was any conflict. Defendants also agreed simply to accept service of the Amended Complaint and not to require service of process, as Plaintiff had planned to accomplish. Accordingly, Plaintiff simply served its Amended Complaint on Defendants' counsel on October 15, 2009, making Defendants' motion due November 4, 2009.

Subsequently, Defendants' counsel did determine he had a serious conflict on the afternoon of November 18, 2009 -- a previously calendared hearing on a motion for summary judgment in a class action case in the Federal Court for Idaho. Defendants' counsel contacted the Court's clerk and obtained a new hearing date on Defendants' Second Motion to Dismiss of December 2, 2009, since the Court is apparently unavailable during the intervening week of November 23, 2009. Defendants' counsel filed an Amended Notice of hearing and sent

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE THREE DAY NOTICE OF INTENT TO TAKE DEFAULT AND DEFAULT JUDGMENT, P. 2

Plaintiff's counsel a copy with an explanatory letter.<sup>1</sup> Thereafter, Plaintiff's counsel, apparently doubting Defendants' counsel's representation, asked for proof of the existence of the conflict and in turn received the case information to confirm the conflict (Williams Affidavit: ¶ 3).

Thereafter, Defendants filed their Second Motion to Dismiss within the twenty (20) day period on November 3, 2009. Defendants' counsel informed Plaintiff's counsel, however, that due to the postponement of the hearing, Defendants would be filing their supporting memorandum in accordance with Rule 7(b)(3)(E) two weeks before the hearing. Apparently, in a fit of pique, Plaintiff then filed its Three Day Notice of Intent to Take Default and Default Judgment a day before the expiration of the twenty day period for Defendants to file their motion, November 3, 2009. Rather than contact Defendants' counsel regarding any proposals for an alternative briefing schedule or regarding any other legitimate concerns, Plaintiff instead simply filed this notice (Williams Affidavit: ¶¶ 5, 6).

Not surprisingly, the Court is not empowered to grant a default under these circumstances. Rule 55(a)(1) only authorizes entry of a default when a party against whom a judgment for affirmative relief is sought "has failed to plead or otherwise defend as provided by these rules. . ." In this case Defendants have in fact defended themselves by filing two motions to dismiss pursuant to Rule 12(b)(6), one concerning Plaintiff's original complaint – a significant part of which led to dismissals of Plaintiff's claims by the Court – and the second concerning Plaintiff's amended complaint. A hearing is set on December 2, 2009, regarding Defendants'

---

<sup>1</sup> See Affidavit of Daniel E. Williams Re: Motion to Strike Plaintiff's Three Day Notice of Intent to Take Default and Default Judgment, ¶ 2. Subsequent references to this Affidavit are cited to "Williams Affidavit" by paragraph number.



second motion to dismiss. Upon the Court's resolution of that motion, an Answer will be filed with regard to those counts that survive.

There is simply no basis or reason to assert grounds for entry of default or default judgment.

DATED this 8<sup>th</sup> day of November, 2009.

THOMAS, WILLIAMS & PARK, LLP



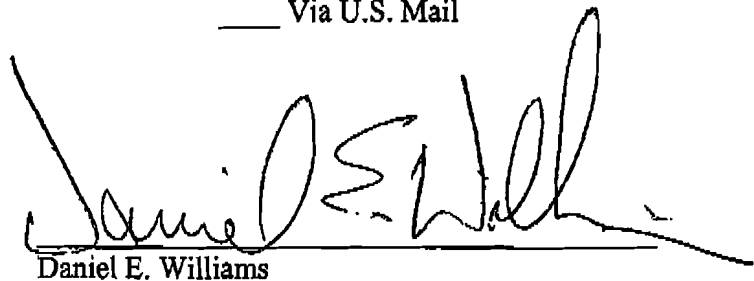
Daniel E. Williams  
Attorney for Defendants

#### CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of November, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 685-2321  
☐ Via U.S. Mail



Daniel E. Williams

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE THREE  
DAY NOTICE OF INTENT TO TAKE DEFAULT AND DEFAULT JUDGMENT, P. 4

**ORIGINAL**

NO. \_\_\_\_\_  
AM. \_\_\_\_\_ FILED P.M. 2:03

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
danw@twplegal.com

NOV 09 2009

**J. DAVID NAVARRO, Clerk**  
By **KATHY J. BIEHL**  
DEPUTY

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,  
Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**NOTICE OF HEARING ON  
MOTION TO STRIKE THREE  
DAY NOTICE OF INTENT  
TO TAKE DEFAULT AND  
DEFAULT JUDGMENT**

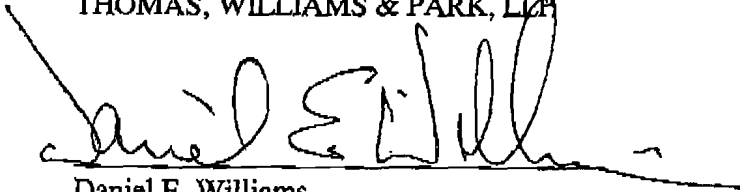
**YOU ARE HEREBY NOTIFIED** that Defendants Berryhill & Company, Inc., John E.

Berryhill III and Amy Berryhill, by and through their counsel of record, will bring on for hearing before this court on December 2, 2009, at 2:45 p.m., their Motion to Strike Plaintiff's Three Day Notice of Intent to Take Default and Default Judgment.

**NOTICE OF HEARING ON MOTION TO STRIKE THREE DAY NOTICE OF INTENT TO  
TAKE DEFAULT AND DEFAULT JUDGMENT, P. 1**

DATED this 9<sup>th</sup> day of November, 2009.

THOMAS, WILLIAMS & PARK, LLP

  
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 9<sup>th</sup> day of November, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 685-2321  
☐ Via U.S. Mail

  
Daniel E. Williams

NOTICE OF HEARING ON MOTION TO STRIKE THREE DAY NOTICE OF INTENT TO  
TAKE DEFAULT AND DEFAULT JUDGMENT, P. 2

**ORIGINAL**FILED  
P.M.

NOV 10 2009

J. DAVID NAVARRO, Clerk  
by P. BOURNE  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**AFFIDAVIT OF ERIC CLARK  
FILED IN OPPOSITION TO  
DEFENDANTS' MOTION TO  
STRIKE PLAINTIFF'S THREE-DAY  
NOTICE OF INTENT TO TAKE  
DEFAULT  
AND  
FILED IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
SANCTIONS**

\*\*\*\*\*

STATE OF IDAHO            )  
                                  ) ss.  
County of Ada            )

Eric R. Clark, being first duly sworn, and upon personal knowledge of the facts and  
circumstances recited herein, deposes and states:

1. I am over the age of 18 years, and I and counsel for the Plaintiff in this case.

AFFIDAVIT OF ERIC CLARK FILED IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE  
PLAINTIFF'S THREE-DAY NOTICE OF INTENT TO TAKE DEFAULT AND FILED IN SUPPORT  
OF PLAINTIFF'S MOTION FOR SANCTIONS - 1

000191

pg

2. I have reviewed the Defendants' Motion To Strike Three Day Notice of Intent to Take Default and Default Judgment, the Defendants' Memorandum in Support of that Motion, Mr. Williams' Affidavit filed in support of that Motion, and the Exhibits attached.

3. When Mr. Williams informed me TWO WEEKS after the October 14, 2009 hearing that he was resetting the Motion to Dismiss hearing the Court had set for November 18, 2009, because he just then discovered a scheduling conflict, I responded by facsimile that regardless of the new hearing date, I expected him to file his second Motion to Dismiss the following week, as the 20 day deadline agreed upon at the hearing to file a responsive pleading was November 4, 2009. A true and correct copy of my facsimile transmission is attached as **Exhibit A**. (Rule 15, IRCP actually established the deadline to respond at 10 days)

4. Mr. Williams responded by letter, dated November 2, 2009, (Attached as Exhibit B to Mr. Williams' Affidavit), in which Mr. Williams indicates he did not intend to file his "motion and briefing" until November 18, 2009.

5. I responded by letter the following day, indicated that Rule 15 and its deadline applied, and attached our Three-day Notice of Intent to Take Default, based on Mr. Williams' representation that he did not intend to file his Second Motion for another three weeks. Mr. Williams has attached my letter to his Affidavit as Exhibit C. Mr. Williams' copy of my letter indicates his office received this letter and Three-Day Notice by facsimile transmission at "11:21:43 AM" from my office facsimile number.

6. **Exhibit B** attached hereto is a true, correct and accurate copy of the facsimile verification from my facsimile machine confirming we filed the Three-Day Notice with the Ada County Clerk's office on November 3, 2009 at 11:15 AM.

AFFIDAVIT OF ERIC CLARK FILED IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S THREE-DAY NOTICE OF INTENT TO TAKE DEFAULT AND FILED IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS - 2

7. **Exhibit C** attached hereto is a true, correct and accurate copy of the facsimile verification from my facsimile machine confirming we sent my November 3, 2009 letter and the attached Three-Day Notice to Mr. Williams' office on November 3, 2009 at 11:24 AM.

8. **Exhibit D** is a true and correct copy of the facsimile transmission cover sheet attached to Mr. Williams' Second Motion to Dismiss. The document indicates Mr. Williams sent his Second Motion to Dismiss to my office at 12:34 PM on November 3, 2009, or more than one hour after Mr. Williams received my letter and Three-Day Notice of Intent to Take Default.

9. Mr. Williams had previously filed a Motion to Dismiss, and his Second Motion to Dismiss is almost identical, except for the addition of a line or two of text. In my opinion, it would have taken a competent attorney or legal secretary less than 5 minutes to create Mr. Williams' Second Motion to Dismiss by modifying slightly Mr. Williams' first Motion to Dismiss.

10. I filed the Three-Day Notice because I believed that if we waited until November 18, 2009, Mr. Williams would find another excuse to delay the proceedings.

11. I filed the Three-Day Notice appropriately when Mr. Williams informed me he was not going to file a timely response to the service of our Amended Complaint. The attached Exhibits establish and confirm that Mr. William's allegation that I filed the Notice AFTER he filed his Motion is baseless.

I declare under penalty of perjury under the laws of the State of Idaho and the laws of the United States, that the foregoing is true and correct to the best of my knowledge and belief.

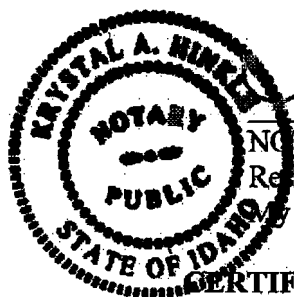
DATED this 10th day of November 2009.

AFFIDAVIT OF ERIC CLARK FILED IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S THREE-DAY NOTICE OF INTENT TO TAKE DEFAULT AND FILED IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS - 3



Eric R. Clark

SUBSCRIBED AND SWORN to before me this 10th day of November 2009.



*Kristal A. Hinkle*  
NOTARY PUBLIC for the State of Idaho

Residing at: *Boise, Idaho*

Commission expires: *November 24, 2014*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 10th day of November, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



ERIC R. CLARK

AFFIDAVIT OF ERIC CLARK FILED IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S THREE-DAY NOTICE OF INTENT TO TAKE DEFAULT AND FILED IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS - 4

To: Dan Williams

Sent: 10/30/2009 at 5:00 PM

---

**FACSIMILE TRANSMITTAL SHEET**

---

**From:** CLARK & ASSOCIATES, ATTORNEYS**Fax:** 208 939-7136**Date:** Friday, October 30, 2009**Phone:****Time:** 4:58:33 PM**To:** Dan Williams**Fax:** 3457894**Regarding:**☐ Urgent ☒ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

---

**Dan:**

Good luck with your hearing on the 18th. I look forward to reading your Motion to Dismiss next week.

Thanks, Eric

EXHIBIT 

000195



**Fax Information Sheet**

Fax File: C:\Program  
Files\Mightyfax\SEND\FAX00742.APF  
To: ADA COUNTY DISTRICT COURT  
Fax#: 2876919  
Subject: Notice of Intent  
Pages: 2 page(s)  
Notes:  
Codes:  
Sent: 11/3/2009 at 11:15 AM  
Results: 2 pages of 2 were sent. Transmission  
time: 01:35

EXHIBIT

**B**

000196

**Fax Information Sheet**

Fax File: C:\Program  
Files\Mightyfax\SEND\FAX00743.APF  
To: Dan Williams  
Fax#: 3457894  
Subject: 3 day notice  
Pages: 3 page(s)  
Notes:  
Codes:  
Sent: 11/3/2009 at 11:24 AM  
Results: 3 pages of 3 were sent. Transmission  
time: 02:43

EXHIBIT 

000197

NOV. 3. 2009 12:34PM

NO. 7720- P. 1/3 - - -



**THOMAS, WILLIAMS  
& PARK**

**Tel 208 345-7800  
Fax 208 345-7894**

**DATE:** November 3, 2009  
**TO:** Eric R. Clark  
**FAX NO:** 685-2321  
**FROM:** Daniel E. Williams  
**RE:** Mosell Equities v. Berryhill & Company

**YOU WILL RECEIVE 3 PAGES OF COPY - INCLUDING THIS COVER SHEET.** (If you do not receive all pages, please call the above telephone number as soon as possible.)

**MESSAGE:** Copy of Defendants' Second Motion to Dismiss.

**\*\*\*\*\*IMPORTANT MESSAGE\*\*\*\*\***

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the above address via the U.S. Postal Service. Thank you.

**EXHIBIT**

**D**

000198

TIME RECEIVED

November 10, 2009 5:01:37 PM MST

REMOTE CSID  
208 939-7136

DUATION  
533

PAGES  
12

STATUS  
Received

Sent by: CLARK & ASSOCIATES, ATTORNEYS

208 939-7136

11/10/2009 4:52:56 PM

Page 1 of 12

FILED  
P.M. 4-

NOV 10 2009

J. DAVID NAVARRO, Clerk  
By R. BOURNE  
DEPUTY

**ORIGINAL**

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**RESPONSE TO DEFENDANTS'  
MOTION TO STRIKE PLAINTIFF'S  
THREE DAY NOTICE OF INTENT  
TO TAKE DEFAULT AND  
DEFAULT JUDGMENT  
AND  
MOTION FOR SANCTIONS**

Judge Williamson

COMES NOW the Plaintiff, by and through its attorney of record, and hereby files its  
Memorandum in Opposition to the Defendants' Motion to Strike the Plaintiff's Three-Day  
Notice of Intent to Take Default and hereby files her Motion for Sanctions.

RESPONSE TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S THREE-DAY NOTICE OF INTENT TO  
TAKE DEFAULT - 1

000199

### ARGUMENT

The Court must deny the Defendants' Motion to Strike as the Plaintiff's Three-Day Notice was filed timely and appropriately.

The Defendants are conducting a masterful delay campaign as evidenced by Mr. Williams' admission that he waited two full weeks after the hearing on October 14, 2009 to consult his calendar and determine he was unavailable on November 18, the time set by the Court for Mr. Williams' second motion to dismiss.

In an effort to keep the case moving along, after Mr. Williams informed Plaintiff's counsel of the additional delay, as indicated in Exhibit C attached to Mr. Williams Affidavit, counsel filed the 3-day notice of intent to take default. **THEREAFTER**, and contrary to Mr. William's direct representation, Mr. Williams filed his *Second* Motion to Dismiss.

Mr. Williams suggests that Plaintiff's counsel acted in a "fit of pique," and filed the Three-Day Notice only after Mr. Williams filed his Motion to Dismiss. However, the Exhibits attached to the Affidavit of Plaintiff's Counsel prove that the Plaintiff filed its Three-Day Notice *before* Mr. Williams filed his Motion to Dismiss. The Plaintiff filed a copy of the Three-Day Notice on November 3, 2009 with the Ada County Court at 11:15 a.m. via facsimile transmission. The Plaintiff then served Mr. Williams at 11:24 a.m. by fax. After receiving the Plaintiff's Notice, the Defendants sent their Second Motion to Dismiss to Plaintiff's counsel at 12:34, p.m. with a non-conformed copy. (The Plaintiff has no idea when the Mr. Williams filed his motion with the Court.) If Mr. Williams had not received the Plaintiff's Three-Day Notice of Intent, **BEFORE** filing his Second Motion to Dismiss, as he apparently claims, then why didn't Mr. Williams wait until November 18, 2009 to file his "*motion* and briefing" as he indicated was

his intent on November 2, 2009? The reality is Mr. Williams received the Plaintiff's Notice before he filed his Second Motion to Dismiss, but then misrepresented this fact to the Court in his Memorandum – there simply is no other explanation.

### **MOTION FOR SANCTIONS - ATTORNEY FEES**


The Plaintiff is entitled to attorney fees according to Rule 11, IRCP and Idaho Code 12-123. Mr. Williams' Motion to Strike is without any legal or factual basis, and it appears Mr. Williams has directly misrepresented information to the Court. This Motion has no merit whatsoever, and was obviously filed to harass the Plaintiff and needlessly increase the cost of litigation.

### **CONCLUSION**

Because the time had passed for filing a response to the Plaintiff's Amended Complaint, the Plaintiff timely and appropriately filed a Three-Day Notice of Intent to Take Default. Only after receiving the Notice did the Defendants respond. Consequently, there is no legal or factual basis to grant the Defendants' Motion to Strike the Plaintiff's Three-Day Notice of Intent to Take Default.

RESPECTFULLY SUBMITTED this 10th day of November, 2009.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 10th day of November, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK

**ORIGINAL**

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 2/3  
**NOV 18 2009**  
J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
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**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,**  
**Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho**  
**corporation, JOHN E. BERRYHILL III and**  
**AMY BERRYHILL, individually, and as**  
**husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**MEMORANDUM IN SUPPORT**  
**OF SECOND MOTION TO**  
**DISMISS**

The above-named Defendants, by and through their attorney of record, hereby submit the following Memorandum in Support of Second Motion to Dismiss.

MEMORANDUM IN SUPPORT OF SECOND MOTION TO DISMISS, P. 1

000203

No



## **INTRODUCTION**

After this Court granted Defendants' motion to dismiss regarding Plaintiff's attempts to state a claim to pierce the corporate veil, Plaintiff tries once again to accomplish the same aim in its Amended Complaint.<sup>1</sup> Although Plaintiff at least recognizes now that its attempts to impose individual liability on John and Amy Berryhill require piercing the corporate veil, its attempt still fails. Even taken as true, the allegations set forth in the Amended Complaint cannot rise to the level required for the Court to disregard the existence of the corporate form.

Plaintiff also seeks to state a claim for fraud in the inducement, but misrepresents the writing at issue and thus fails to plead with the requisite particularity.

## **ARGUMENT**

### **1. The appropriate standard under Rule 12(b)(6) requires a "showing."**

As this Court indicated in its Memorandum Decision, the standard for a motion to dismiss for failure to state a claim set forth in *Partout v. Harper*, 145 Idaho 683, 686 (2008), "does not appear to be significantly different from that in *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 (2007), because both require a complaint to be based on some sort of factual allegation" (Memorandum Decision: p. 2, n.1).<sup>2</sup> In *Partout*, the plaintiff's third-party beneficiary claim was sufficient because it was supported by "factual averments in the complaint" supporting the

---

<sup>1</sup> The Court found specifically that "... the factual allegations necessary to support a claim for piercing the corporate veil are not in the complaint." Memorandum Decision and Order on Defendant's Motion to Dismiss filed July 28, 2009, p. 4. Subsequent references to this Decision are cited to "Memorandum Decision" by page number.

<sup>2</sup> Defendants incorporate their previous discussion regarding the standard of review set forth in Memorandum in Support of Defendants' Motion to Dismiss filed June 30, 2009, as well as Defendants' Reply in Support of Motion to Dismiss filed July 20, 2009.

existence of the contract and that plaintiff was a third-party beneficiary. 145 Idaho at 687. The requirement of "factual averments" reinforces the language of Rule 8(a)(1), I.R.C.P., that a party "show," not just state, that the pleader is entitled to relief.

**2. Plaintiff's factual allegations, even if true, do not justify piercing the corporate veil as a matter of law.**

As with its first attempt to ignore the corporate existence of Berryhill & Co, Inc., Plaintiff still apparently believes that the corporate identity may be ignored quite easily. Case law makes it plain, however, that ignoring the corporate form by piercing the veil is a rare and "exceptional" remedy:

**A. Piercing the corporate veil is a "rare" and "extreme" remedy.**

A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. *See, e.g., First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983) ("Separate legal personality has been described as 'an almost indispensable aspect of the public corporation'"); *Burnet v. Clark*, 287 U.S. 410, 415, 77 L. Ed. 397, 53 S. Ct. 207, 1933-1 C.B. 175 (1932) ("A corporation and its stockholders are generally to be treated as separate entities").

\*\*\*

The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional circumstances. . .

*Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) (further citations omitted).

As the Eighth Circuit Court of Appeals has explained,

"In extreme circumstances, . . . the corporate form will be disregarded and the personal assets of a controlling shareholder or shareholders may be attached in order to satisfy the debts and liabilities of the corporation." . . . However, courts should "only reluctantly and cautiously" pierce the corporate veil, and the "veil may not be pierced absent a showing of improper conduct." *Id.* "[T]he party who

wishes to pierce the corporate veil bears the burden of proving that there are substantial reasons for doing so." *Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir. 1985).  
(emphasis added)

*NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 728 (8th Cir. 2008) (further citations omitted).

Likewise, the Ninth Circuit has explained:

The district court clearly erred in finding that Sommer was the alter ego of M-MLS, Inc. solely because of the fact of control. 'Alter ego is a limited doctrine, invoked only where recognition of the corporate form would work an injustice to a third person.' *Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 31 Cal.Rptr.2d 433, 443 (Cal. Ct. App. 1994) (citation omitted) (emphasis in the original). The injustice that allows a corporate veil to be pierced is not a general notion of injustice; rather, it is the injustice that results only when corporate separateness is illusory. See *id.* (listing examples of the "critical facts" needed to establish that it would be inequitable to respect separate corporate identities "as inadequate capitalization, commingling of assets, [or] disregard of corporate formalities"). . . . The mere fact of sole ownership and control does not eviscerate the separate corporate identity that is the foundation of corporate law. See *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475, 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003) ("The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional circumstances."); 1 William Meade Fletcher et al., *Fletcher Cyclopedic of the Law of Private Corporations* § 41.35, at 671 (perm. ed., rev. vol. 1999) ("Allegations that the defendant was the sole or primary shareholder are inadequate as a matter of law to pierce the corporate veil. Even if the sole shareholder is entitled to all of the corporation's profits, and dominated and controlled the corporation, that fact is insufficient by itself to make the shareholder personally liable." (footnotes omitted)).

*Katzir's Floor & Home Design, Inc. v. M-MLS.COM*, 394 F.3d 1143, 1149 (9th Cir. 2004).

Idaho adheres to this view that ignoring the corporate form is an extreme and rare occurrence:

To warrant casting aside the legal fiction of distinct corporate existence. . . it must . . . be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person has ceased; and it must further

appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice." *Hayhurst v. Boyd*, 50 Idaho 752, 761, 300 P. 895, 897 (1931) (citations omitted).  
(emphasis added)

*Maroun v. Wyreless Sys.*, 141 Idaho 604, 613 (Idaho 2005). Similarly, the Idaho Supreme Court has indicated:

In order for a corporation to be an alter ego of an individual, there must be (1) a unity of interest and ownership to a degree that the separate personalities of the corporation and individual no longer exist and (2) if the acts are treated as acts of the corporation an inequitable result would follow.  
(emphasis added)

*Vanderford Co. v Knudson*, 144 Idaho 547, 556-57, 165 P.3d 261, 270-71 (2007), *citing*, *Surety Life Ins. Co. v. Rose Chapel Mortuary*, 95 Idaho 599, 601, 514 P.2d 594, 596 (1973). *See also*, *Neibaur v. Neibaur*, 142 Idaho 196, 201 (2005) (Idaho Supreme Court declined to adopt the remedy of piercing the corporate veil in the context of a divorce division of community property); *Pierson v. Jones*, 102 Idaho 82, 84 (1981) (undercapitalization of corporation insufficient to justify piercing the corporate veil); *Jordan v. Hunter*, 124 Idaho 899, 905 (Ct. App. 1993) (" the powers of the court to disregard the corporate form, i.e., to "pierce the corporate veil," may be exercised only under limited circumstances. . .").

The above discussion provides the context in which the Court must evaluate Plaintiff's latest attempt to plead a cognizable claim for piercing the corporate veil of Berryhill & Co., Inc., in order to establish individual liability against John and Amy Berryhill.

**B. Plaintiff's allegations are insufficient to justify this rare and extreme remedy.**

Plaintiff's allegations at Count Six, even when taken as true, fail to state a claim for disregarding the corporate form.<sup>3</sup> At Paragraphs 43, Plaintiff simply leaps to the conclusion that "Berryhill & Company, Inc. is the alter ego of John and Amy Berryhill," providing no factual underpinning. At Paragraphs 44, 45 and 46, Plaintiff merely notes that Berryhill & Co, Inc., is a closely-held corporation with John Berryhill as the sole shareholder and the lack of other officers or directors other than John and Amy Berryhill. As the Ninth Circuit made clear in the case of *Katzir's Floor & Home Design, Inc. v. M-MLS.COM*, supra, 394 F.3d at 1149 (9th Cir. 2004), however, the rules do not change simply because a corporation is closely held.

Paragraphs 47, 48, 49, 50 and 51 allege various activities of John and Amy Berryhill with regard to Berryhill & Co., Inc., including using corporate assets for personal use, entertaining guests at the restaurant without compensating the corporation, using corporate credit cards to purchase gas for personal vehicles, using funds "in corporate accounts" to pay for improvements to their personal residences, and using restaurant gift certificates to barter for their personal benefits. None of these allegations, even if true, can show that the separate corporate existence of Berryhill & Co., Inc., has "ceased," as required by Idaho law. Obviously, especially with a closely held corporation the distinction between "personal" and "business" can become difficult to establish. None of the allegations rise to the necessary level to justify the rare and extreme remedy of piercing the corporate veil. Plaintiff does not even attempt to claim, because it cannot,

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<sup>3</sup> Based on Count Six, Plaintiff adds John Berryhill as an individual Defendant to its Counts One, Two, Three and Five. Nowhere, however, does Plaintiff's Amended Complaint state an individual claim against Defendant Amy Berryhill, who is named in the caption "individually."

such facts as undercapitalization, disregard of corporate formalities or the kind of commingling of corporate assets necessary to demonstrate that the separate existence of Berryhill & Co., Inc., had “ceased.”

As the Third Circuit has explained,

Not every disregard of corporate formalities or failure to maintain corporate records justifies piercing the corporate veil. That remedy is available only if it is also shown that a corporation's affairs and personnel were manipulated to such an extent that it became nothing more than a sham used to disguise the alter ego's use of its assets for his own benefit in fraud of its creditors. In short, the evidence must show that the corporation's owners abused the legal separation of a corporation from its owners and used the corporation for illegitimate purposes.

*Kaplan v. First Options*, 19 F.3d 1503, 1521 (3d Cir. 1994).

In the Idaho appellate cases in which justifiable grounds were found to pierce the corporate veil, the common thread is a serious failure to observe corporate formalities. *See, e.g., Chick v. Tomlinson*, 96 Idaho 483 (1975) (lack of corporate formalities, such as directors' meetings); *Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc., supra*, 95 Idaho 373 (1966) (lack of corporate formalities such as director and shareholder meetings). On the other hand, the Court of Appeals found in *Alpine Packing Co. v. H.H. Keim Co.*, 121 Idaho 762, 764 (Ct. App. 1991), that although corporate owners “did not run the business as they should have” and failed to observe certain formalities, the plaintiff did not demonstrate “such a” unity of interest and ownership that would allow a reasonable inference of disregard of the status of a separate corporation.

The matters pled by Plaintiff in the above-referenced paragraphs simply fail to rise to the necessary level to state a claim for finding that the separate identity of Berryhill & Co., Inc., has ceased.

MEMORANDUM IN SUPPORT OF SECOND MOTION TO DISMISS, P. 7

**C. Plaintiff fails to plead the kind of fraud or “injustice” necessary to invoke the remedy of piercing the corporate veil.**

At paragraph 54, Plaintiff attempts to plead an “injustice” or inequitable result in order to satisfy the second prong of the test set forth in *Surety Life Ins. Co. v. Rose Chapel Mortuary, supra*, 95 Idaho at 601 (1973). Instead of describing the alleged inequitable result that would follow absent piercing the corporate veil, Plaintiff merely incants the formulation that an “inequitable result would follow, and such a result would sanction a fraud and promote injustice.” Such an allegation is insufficient to state a claim pursuant to the second prong of the test. For instance, in *Davidson v. Beco Corp.*, 112 Idaho 560, 569 (Ct. App. 1986), the court held that the district court erred in refusing to grant an individual defendant’s motion for judgment n.o.v., because, although plaintiff had satisfied the first prong of the test, there was no showing whatsoever on the second prong that the individual defendant had “drained both corporations of resources with which to pay a judgment.” Here, Plaintiff does not state a claim under the second prong by simply alleging that if individual defendants “are allowed to hide behind the corporate shield and avoid personal liability,” an unspecified inequitable result would follow. Some separate fraud or injustice must be pled so as to state a claim to pierce the veil. It is hardly sufficient for Plaintiff to worry in general about the corporation’s ability to repay its alleged loan.

**D. John Berryhill signed Exhibit 1 on behalf of Berryhill & Co., Inc., as a matter of law.**

At paragraph 52, Plaintiff alleges that when John Berryhill signed Exhibit A, he did not explicitly indicate he was signing on behalf of Berryhill & Co., Inc., and presumably should be held individually liable for that reason. This allegation also fails as a matter of law as a basis for imposing individual liability. Exhibit A clearly shows payment to “Berryhill & Co.,” not John

Berryhill individually. Moreover, the handwritten portion of the document refers specifically to “Berryhill & Co.” Under these circumstances, it is unnecessary for John Berryhill also to include the words “President” or some other designation that he is signing on behalf of Berryhill & Co., Inc. *See, e.g., General Motors Acceptance Corp., v. Turner Ins. Agency*, 96 Idaho 691, 696-97 (1975) (“A person making a contract with another as an agent for a disclosed principal does not become a party to the contract”).

Because the existence of Berryhill & Co., Inc., was disclosed in the document itself, which was acknowledged by Plaintiff by making payment to Berryhill & Co., Inc., Plaintiff cannot impose individual liability on John Berryhill acting as agent for Berryhill & Co., Inc.

**3. Under the heightened pleading standard of Rule 9(b), Plaintiff does not state a claim for fraud in the inducement.**

At Count Five, Plaintiff attempts to state a claim for Fraud in the Inducement. At paragraph 34, Plaintiff states, apparently in reference to Exhibit A to the Amended Complaint, that “John Berryhill represented to Glen Mosell in writing that monies Mosell Equities, LLC loaned to Berryhill & Co. would remain as loans to Berryhill & Co. . .” What Exhibit A actually states is:

This [referring to the \$50,000 check appearing above] is a loan from Mosell Equities to cover some misc. downtown expenses during our bookkeeper [sic] transition. It will go into the general check register & be used for any billing of payables needed for downtown or Berryhill & Co. It will be transitioned into part of Glenns ‘buy in’ of Moberry Venture Corp. Inc.  
(emphasis added)

Nowhere does this writing state that “monies” “would remain as loans” and “if” the parties ultimately formed another business entity, “then” those funds would be transitioned, as Plaintiff’s version states at paragraph 34. Instead, the actual writing states that “this” is a loan and that it



“will be” transitioned. Thus, unless Plaintiff is referring to a different writing than Exhibit A, the writing does not state what Plaintiff claims it does. Defendant Berryhill & Co., Inc., is not liable for Plaintiff’s misrepresentation of what Exhibit A to its Amended Complaint actually says and does not say.

Rule 9(b) requires that the “circumstances constituting fraud. . . shall be stated with particularity.” Particularity necessarily signifies that the circumstances be pled accurately, as does Rule 11(a). As a federal district court recently stated,

A claim alleging fraud is subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which requires that the circumstances constituting fraud or mistake be pleaded with particularity. "Malice, intent, knowledge, and other conditions of a person's state of mind," on the other hand, may be alleged generally. *Id.* To satisfy Rule 9(b)'s heightened pleading requirements, a plaintiff must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). The Second Circuit has explained that [t]he purpose of Rule 9(b) is threefold -- it is designed to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit. Thus, although Rule 9(b) permits knowledge to be averred generally, we have repeatedly required plaintiffs to plead the factual basis which gives rise to a strong inference of fraudulent intent. Essentially, while Rule 9(b) permits scienter to be demonstrated by inference, this must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. An ample factual basis must be supplied to support the charges. *O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991) (internal citations and quotation marks omitted).

*Lehman v. Garfinkle*, 2009 U.S. Dist. LEXIS 84686 (S.D.N.Y. Aug. 24, 2009) (emphasis added).

Here, Plaintiff does not provide an ample factual basis to support the charge of fraud in the inducement because it does not even describe accurately the writing at issue. Instead, it stretches and construes Exhibit A to say something very different than what it actually says. A

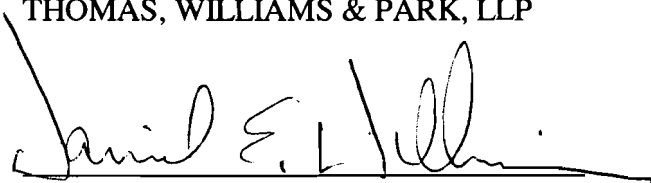
court is only bound to take "well-pleaded" factual allegations as true. *Papasan v. Allain*, 478 U.S. 265, 283, 106 S. Ct. 2932, 92 L.Ed.2d 713 (1986) ("we are bound for the purposes of this review to take the well-pleaded factual allegations in the complaint as true"). The failure even to plead a written representation in lines with what the writing actually said does not constitute a well-pleaded allegation. Such conduct is also not consistent with the pleading requirements of Rule 9(b) and Plaintiff fails to state a claim for fraud in the inducement.

### **CONCLUSION**

For all the foregoing reasons, Defendants respectfully request that, as to Plaintiff's Amended Complaint, the Court dismiss Count VI ("Piercing the Corporate Veil"), dismiss John and Amy Berryhill individually and dismiss Count Five ("Fraud in the Inducement").

DATED this 18<sup>th</sup> day of November, 2009.

THOMAS, WILLIAMS & PARK, LLP

A handwritten signature in black ink, appearing to read "Daniel E. Williams", written over a horizontal line.

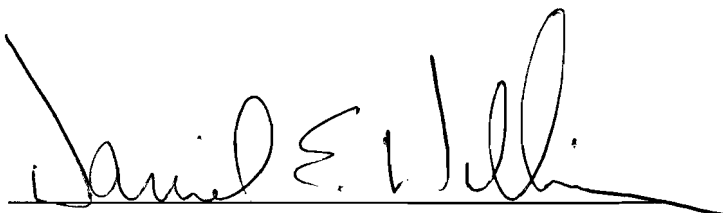
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of November 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 685-2321  
☐ Via U.S. Mail

  
Daniel E. Williams

NO. \_\_\_\_\_ FILED *JH*  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

NOV 25 2009

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Idaho State Bar No. 4697

J. DAVID NAVARRO, Clerk  
By PATRICIA A DWONCH  
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**PLAINTIFF'S RESPONSE TO  
DEFENDANTS' *SECOND* MOTION  
TO DISMISS**

Judge Williamson

\* \* \* \* \*

COMES NOW the Plaintiff Mosell Equities, LLC and hereby responds to the  
Defendants' *Second* Motion to Dismiss.

Following the Court's decision partially granting the Defendants' Motion to Dismiss,  
Mosell Equities filed an Amended Complaint and a Motion to Reconsider. Mosell Equities  
supplanted its claim for breach of an oral contract with a claim for breach of contract based on a

handwritten note confirming that John Berryhill was accepting money from Mosell Equities as a “loan.” Mosell Equities also included a claim for fraud in the inducement against John Berryhill and his company and specifically identified the requisite elements of a claim for piercing the corporate veil and alleged facts warranting that remedy.

During the recent hearing regarding Plaintiff’s Motion to Reconsider, Defendants’ Counsel informed the Court that he intended to file yet another Motion to Dismiss and indicated that he had a good legal and factual basis to do so. The Court appeared surprised, considering Mosell Equities’ Amended Complaint, but indicated the Court would set the matter for hearing.

Notwithstanding Counsel’s representation, however, the Defendants have failed to establish any basis to support *another* Motion to Dismiss.

#### **I. MOSELL EQUITIES HAS PLED A CLAIM FOR FRAUD IN THE INDUCEMENT**

The Defendants completely disregard any pleading standard and argue, as the sole basis to dismiss, their biased and somewhat tortured interpretation of Amended Complaint Exhibit A, a copy of which Mosell Equities has attached for the Court’s convenience.

This Exhibit confirms Berryhill’s acknowledgment and understanding that Mosell Equities’ money was a loan, and confirms his promise that these funds will be transitioned into part of “buy in.” However, Mosell Equities also alleges that “buy in” never occurred. As the money was never “transitioned,” the status of that money as loans to Berryhill never changed.

A reasonable, logical, and in fact the only plausible reading of Exhibit A is if the “buy in” does not occur, then the money remains as a loan. Pretty simple, and exactly what Mosell Equities has pled.

## **II. “JOHN BERRYHILL SIGNED EXHIBIT 1 [SIC] ON BEHALF OF BERRYHILL & CO., INC. AS A MATTER OF LAW”??**

Berryhill calls his restaurant *Berryhill & Co*, while identifying his corporation as Berryhill & Company, Inc. (Please see the attached Secretary of State filing) When Berryhill wrote Exhibit A, he was operating a restaurant called *Berryhill & Co.* on Broadway in Boise, and was contemplating or was in the process of transitioning that facility “downtown.” Nowhere does Berryhill refer to his corporation in Exhibit A; he does however, refer to his restaurant.

## **III. MOSELL EQUITIES HAS PLED THE REQUISITE ELEMENTS AND FACTS TO SUPPORT PIERCING THE CORPORATE VEIL.**

When construing Mosell Equities’ pleadings, the Court must deny the Defendants’ motion to dismiss, “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” Furthermore, the Court must draw all reasonable inferences in Mosell Equities’ favor. *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156 (2005).

Additionally, the Supreme Court has directed in *Hutchison v. Anderson*, 130 Idaho 936, 950 P.2d 1275 (1997), that when considering whether to pierce the corporate veil, the finder of fact must consider certain factors. However, the *Hutchison* Court cautioned against applying hard and fast rules. Instead, the Supreme Court has directed Courts to consider the “circumstances” of each case when determining whether to disregard the corporate existence.

There are several factors we will review when considering whether the corporate veil should be pierced. For example, was the sole shareholder acting as president of the corporation; was there a lack of corporate formalities, such as directors’ meetings; did the shareholders fail to submit corporate contract and inventory revisions to the board of directors; and were business transactions completed without approval by any director or officer of the corporation. These factors are not exclusive because the conditions under which a corporate entity may be disregarded vary according to the circumstances of the case. *Surety Life*, 95 Idaho at 601, 514 P.2d at 596. (Emphasis added)

Mosell Equities has pled the requisite elements; that the corporation is the Berryhill's alter ego, and that to allow the Berryhills to use the corporate shield to avoid personal liability would sanction a fraud and promote injustice. Mosell Equities also plead facts supporting its claim that there really is no "corporate structure" in the Berryhill's minds as they use corporate assets as their own.

Mosell Equities also pled that it was inequitable and unjust for the Berryhills to retain the benefit of the loan Mosell Equities made to the corporation. However, in their brief, the Berryhills apparently don't think it is inequitable or unjust to entice someone to loan money to their corporation, take that money and use it personally, and then claim they have no responsibility because the loans were made to the corporation?

While the Defendants argue strenuously some manner of higher pleading standard applies, no such standard exists at this stage in the case. In fact, the Defendants again fail to cite to any case that established a pleading standard, and rely erroneously upon cases that discuss burdens of proof at summary judgment and at trial—none of which are applicable here.

Ultimately, the Berryhills concede Mosell Equities has stated the requisite elements and established facts sufficient to pierce the corporate veil by concluding their argument with nothing more than an *opinion*. "The matters pled by Plaintiff in the above-referenced paragraphs *simply fail to rise to the necessary level to state a claim* for finding that the separate entity of Berryhill & Co., Inc. has ceased." (Memorandum in Support of Second Motion to Dismiss, p. 7.) (Emphasis added)

The Court was correct if granting Mosell Equities' Motion to Reconsider based on the facts and allegations in the Amended Complaint, and the Berryhills have presented nothing that should change the Court's mind.

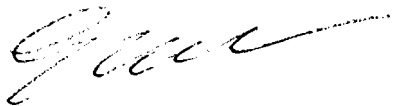
### **CONCLUSION**

As Mosell Equities has met its pleading burden at this stage of the proceedings in support of its claim to pierce the corporate veil and to proceed with its claims against the Berryhills personally, and its claim for fraud, the Court should dismiss this motion.

Therefore, the Plaintiff respectfully requests the Court deny the Defendants' Second Motion to Dismiss.

DATED this 25th day of November, 2009.

CLARK & ASSOCIATES, ATTORNEYS



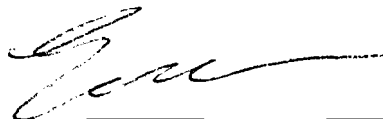
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Eric R. Clark  
For the Plaintiff

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25th day of November, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK



MOSELL EQUITIES LLC  
P.O. BOX 1694  
EAGLE, ID 83616

98-7014/2361  
008700228

5127

DATE: 4/28/07

PAY TO  
THE ORDER OF

Berryhill & Co  
Fifty Thousand <sup>no</sup>/<sub>100</sub>

\$50,000

Home Federal  
MEMO loan

Home Federal Bank  
EAGLE BRANCH  
100 E AVENUE DR - EAGLE, ID 83616

*Sh M-H*

⑆324170140⑆

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This is a loan from Mosell Equities to cover  
some misc. downtown expenses during our bookkeeper  
transition. It will go into the general check register &  
be used for any billing of payables needed for downtown  
or Berryhill & Co.  
It will be transitioned into part of Glenn's "buy in" of  
Mokery Venture Corp. Inc.

*John* *Sh M-H*

No. C 114790

Due no later than April 30, 2008  
Annual Report Form

2. Registered Agent and Office NO PO BOX

Return to:

SECRETARY OF STATE  
450 NORTH FOURTH STREET  
PO BOX 83720  
BOISE, ID 83720-0080

1. Mailing Address - Correct in this box, if applicable

BERRYHILL & COMPANY, INC.  
121 N 9TH STE 102  
BOISE, ID 83702

JOHN E BERRYHILL III  
5650 S SCHOONER WAY  
BOISE, ID 83716

NO FILING FEE IF  
RECEIVED BY DUE DATE

3. New Registered Agent Signature

4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors.

Office held

Name

Street or P.O. Address

City

State

Zip

President/  
Treasurer

John Berryhill III

121 N 9th Ste 102

Boise ID 83702

Secretary

Amy Berryhill

121 N 9th Ste 102

Boise, ID 83702

5. Organized Under the Laws of:

IDAHO  
C 114790

6.

Signature

Date

2/13/08

Name (Typed or Printed)

John Berryhill III

Title

President

Issued 02/01/2008

Do Not Tape or Staple

200804001960

**ORIGINAL**

DANIEL E. WILLIAMS (ISB 3920)  
 THOMAS, WILLIAMS & PARK, LLP  
 121 N. 9<sup>th</sup> St., Suite 300  
 P. O. Box 1776  
 Boise, ID 83701  
 Telephone (208) 345-7800  
 Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants

NO. \_\_\_\_\_  
 A.M. \_\_\_\_\_ FILED P.M. 3:25

NOV 30 2009

J. DAVID NAVARRO, Clerk  
 By KATHY J. BIEHL  
 DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
 Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
 corporation, JOHN E. BERRYHILL III and  
 AMY BERRYHILL, individually, and as  
 husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF SERVICE  
 OF DISCOVERY

TO: CLERK OF THE DISTRICT COURT

YOU ARE HEREBY NOTIFIED that on the 25<sup>th</sup> day of November, 2009, I caused to be  
 served by electronic mail to Eric R. Clark a true and correct copy of Defendant's Answers to  
 Plaintiff's First Set of Interrogatories and Requests for Production of Documents.

NOTICE OF SERVICE OF DISCOVERY, P. 1

DATED this 30<sup>th</sup> day of November, 2009.

THOMAS, WILLIAMS & PARK, LLP



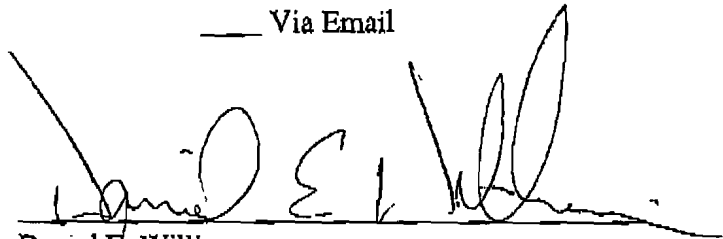
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of November, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☐ Via U.S. Mail  
☐ Via Email



Daniel E. Williams

**ORIGINAL**

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
AM \_\_\_\_\_ PM \_\_\_\_\_

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

NOV 30 2009

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

DEFENDANT'S REPLY BRIEF  
IN SUPPORT OF SECOND  
MOTION TO DISMISS

Defendants hereby submit their Reply Brief in support of their Second Motion to Dismiss.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF SECOND MOTION TO DISMISS, P. 1

000224

### ARGUMENT

1. Plaintiff does not state a claim for piercing the corporate veil.

In response to Defendants' paragraph by paragraph analysis,<sup>1</sup> Plaintiff argues summarily that it "has pled the requisite elements."<sup>2</sup> What Plaintiff ignores is that, even accepted as true for purposes of Rule 12(b)(6), its factual allegations fail to show that it is entitled to the relief sought. To invoke the rare and exceptional remedy of piercing the corporate veil, it is necessary to make at least a minimal factual showing that separate corporate existence has "ceased." *Maroun v. Wyreless Sys.*, 141 Idaho 604, 613 (Idaho 2005) (emphasis added). Plaintiff simply fails to do so.

Attempting to defend the sufficiency of its allegations, Plaintiff cites the case of *Hutchinson v. Anderson*, 130 Idaho 936 (1997). In *Hutchinson*, however, the Idaho Supreme Court made clear, as in *Maroun, supra*, that it must be shown that the separate personalities of the corporation and the individual must no longer exist, but were "indistinguishable." 130 Idaho at 940. Reviewing the findings of the district court, the Supreme Court found the following significant:

Anderson testified that the corporation had annual meetings for its board of directors, but did not introduce minutes from those meetings into evidence. The district court found that Anderson held himself out as the owner of the farming business. With the exceptions of a truck which had the corporation's name on its door and checks which were drawn on a corporate account, there appeared to be no demonstration that Anderson represented to the community that American West was an entity separate from Anderson. The district court found that Anderson used his name interchangeably with the corporation's when dealing with third party vendors. Thus, there is sufficient evidence to support the district court's finding that a unity of interest existed such that there was no distinction between the personalities of Anderson and American West.  
(emphasis added)

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<sup>1</sup> Memorandum in Support of Second Motion to Dismiss, pp. 6-8.

<sup>2</sup> Plaintiff's Response to Defendant's *Second* Motion to Dismiss, p. 4. Subsequent references to this pleading are cited to "Plaintiff's Response" by page number.

130 Idaho at 940.

On the other hand, in this case Plaintiff makes no such allegation regarding any failure to observe corporate formalities. Taken as true, Plaintiff merely recites, at most, certain picayune examples of mixing the corporate and the personal – e.g., using corporate credit cards to purchase gas for personal vehicles, using restaurant gift certificates to barter for personal benefits, certain other alleged personal uses of corporate property. As in *Alpine Packing Co. v. H.H. Keim Co.*, 121 Idaho 762 (Ct. App. 1991), a case Plaintiff fails to distinguish, these allegations do not demonstrate “such a” unity of interest and ownership that would allow a reasonable inference of disregard of the status of the separate corporation.

Similarly, there is a failure of pleading as to the second prong of the Idaho test for piercing the corporate veil set forth in *Surety Life Ins. Co. v. Rose Chapel Mortuary*, 95 Idaho 599, 601 (1973). Plaintiff must allege the inequitable result that would follow if the acts complained of are treated as acts of the corporation only. In *Hutchinson, supra*, for example, the district court found that the corporation was undercapitalized. Here, Plaintiff only intones in the Amended Complaint the conclusion that an “inequitable result would follow, and such a result would sanction a fraud and promote injustice” (Amended Complaint: ¶ 54). In its briefing, Plaintiff states that “the Berryhills apparently don’t think it is inequitable or unjust to entice someone to loan money to their corporation, take that money and use it personally, and then claim they have no responsibility because the loans were made to the corporation” (Plaintiff’s Response: 4). Nowhere, however, has Plaintiff alleged that the Berryhills individually had taken the loaned money and used it personally. Here, Plaintiff is engaging in hyperbole and nowhere makes any showing of a bona fide inequitable result or fraud. Cf., *Davidson v. Beco Corp.*, 112 Idaho 560, 569 (Ct. App. 1986) (no showing on second prong that

the individual defendant had "drained both corporations of resources with which to pay a judgment" so as to claim an actual inequitable result).

For all these reasons, Plaintiff's allegations are insufficient to invoke the rare remedy of piercing the corporate veil.

**2. As a matter of law, John Berryhill signed Exhibit A on behalf of the corporation.**

In response to Defendants' argument regarding Exhibit A<sup>3</sup> to the Amended Complaint that John Berryhill was signing on behalf of the corporation rather than himself personally, Plaintiff argues disingenuously that Mr. Berryhill signed on behalf of the restaurant, not the corporation, and then goes on to argue facts not in the record. As Plaintiff itself has acknowledged, "Mosell Equities loaned money to Berryhill & Company. . ."<sup>4</sup> As Defendant previously demonstrated, it is unnecessary to include the word "President" or any other such designation to avoid individual liability.

Accordingly, as a matter of law Plaintiff cannot impose individual liability on John Berryhill because of his signature on Exhibit A.

**3. Plaintiff fails to fulfill the requirements of Rule 9(b) in pleading fraud.**

In response to Defendants' objection that it has failed to abide by Rule 9(b)'s heightened pleading standard, particularly any indication of why a particular statement was fraudulent, Plaintiff responds in relevant part: "A reasonable, logical, and in fact the only plausible reading of Exhibit A is if the "buy in" does not occur, then the money remains as a loan. Pretty simple, and exactly what Mosell Equities has pled" (Plaintiff's Response: 2). What this argument ignores is that Plaintiff fails

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<sup>3</sup> Plaintiff points out that Defendants referred to this Exhibit erroneously as "Exhibit 1" in their original memorandum.

<sup>4</sup> Complaint, ¶ 14.



to identify a false statement. Its pleading states that John Berryhill represented "in writing" that the funds "would remain as loans to Berryhill & Co. . . ." (Amended Complaint: ¶ 34). The writing to which this paragraph refers is Exhibit A, as Plaintiff confirms in its Response. Yet, the writing only indicates that "this is a loan. . . that will be transitioned into part of Glenns 'buy in' . . ." (emphasis added). Nowhere does the writing indicate that the funds "would remain as loans," as Plaintiff claims in rewriting the document.

Plaintiff fails utterly to adhere to the heightened pleading standard of Rule 9(b) by misrepresenting the very statement upon which it attempts to base a claim of fraud. Such conduct is not consistent with the pleading requirement of Rule 9(b), nor with the requirement that an "ample factual basis" be supplied to support the charges of fraud, as previously argued.

#### CONCLUSION

For all the foregoing reasons, Defendant respectfully request that the Court grant their Second Motion to Dismiss.

DATED this 30 day of November, 2009.

THOMAS, WILLIAMS & PARK, LLP



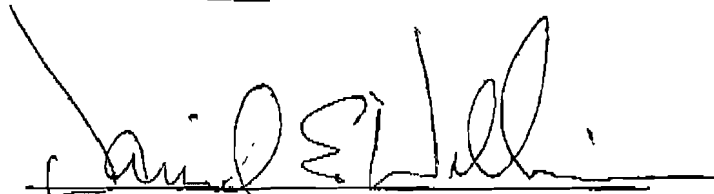
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of November, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☐ Via Facsimile: 939-7136  
☐ Via U.S. Mail  
☒ Via Email

  
\_\_\_\_\_  
Daniel E. Williams



DANIEL E. WILLIAMS, being first duly sworn on oath, deposes and says:

1. I am the attorney for Defendants in the above matter and have personal knowledge of the facts stated herein.

2. After the hearing on October 14, 2009, at which time the Court suggested a hearing date for Defendants' Second Motion to Dismiss of November 18, 2009, I checked my calendar and discovered I had a conflict. In line with the Court's express invitation to notify it if a conflict existed, I personally telephoned the Court's chambers the next day, October 15, 2009, and advised the Court of the conflict. The Court's staff indicated that the next available civil hearing date was December 2, 2009, at 2:45 p.m., since the Court was unavailable during the week of November 23, 2009. Approximately two weeks later, my staff confirmed that December 2, 2009, was still available for hearing and I caused to be filed an Amended Notice of Hearing and notified Plaintiff's counsel of my conflict. As set forth in the Affidavit of Daniel E. Williams Re: Motion to Strike Plaintiff's Three Day Notice of Intent to Take Default and Default Judgment of November 6, 2009, Plaintiff's counsel inquired regarding the conflict and I provided the necessary information for him to confirm the existence of the conflict.

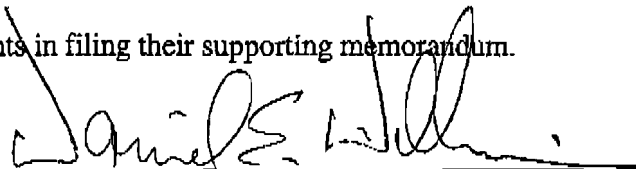
3. Afterwards, in response to Plaintiff's counsel's indication that he looked "forward to reading your Motion to Dismiss next week," I made clear to Plaintiff's counsel that Defendants intended to comply with Rule 7(b)(3), I.R.C.P, in filing the Second Motion to Dismiss and supporting materials. In response, Plaintiff's counsel objected and notified me of his intent to seek a default. I was somewhat bewildered, because the exact timing of the motion and supporting materials had no effect on the pending hearing of December 2, 2009, and

AFFIDAVIT OF DANIEL E. WILLIAMS RE: PLAINTIFF'S MOTION  
FOR SANCTIONS, P. 2

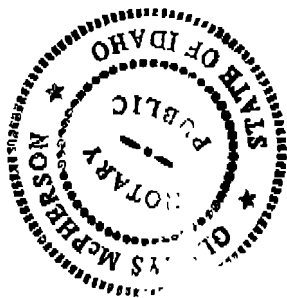
consequently would not affect the timing of the Court's consideration of Defendants' motion. As long as Defendants complied with Rule 7(b)(3), there would be no additional delay.

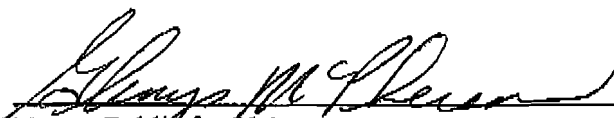
4. True to his word, Plaintiff's counsel filed his Three Day Notice of Intent to Take Default and Default Judgment on November 3, 2009. In an abundance of caution, faced with the prospect, however unlikely, of a default being entered, I caused to be filed Defendants' Second Motion to Dismiss on November 3, 2009. In this motion I made clear that Defendants' desired to file a brief and would do so in conformance with Rule 7(b)(3)(E), I.R.C.P.

5. At no point did I intend to represent that Defendants filed their Second Motion to Dismiss prior to receiving notification of Plaintiff's intent to seek a default. I submit, however, that none of this is particularly significant, because the delay in consideration of Defendants' Second Motion to Dismiss was caused by my conflict and the Court's calendar, rather than any other action or inaction on the part of Defendants in filing their supporting memorandum.

  
Daniel E. Williams

Subscribed and sworn to before me this 30th day of November, 2009.



  
Notary Public for Idaho  
Residing at Boise, Idaho  
My Commission Expires: 11-7-12

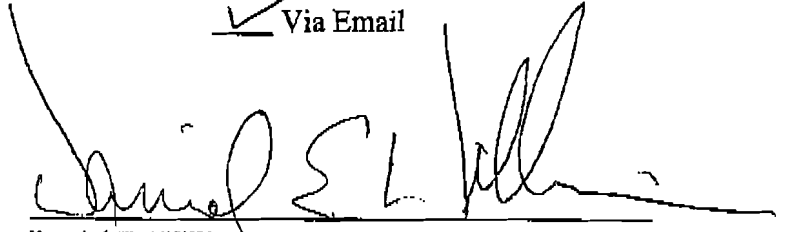
AFFIDAVIT OF DANIEL E. WILLIAMS RE: PLAINTIFF'S MOTION  
FOR SANCTIONS, P. 3

CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of November, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☐ Via Facsimile: 939-7136  
☐ Via U.S. Mail  
☒ Via Email

  
\_\_\_\_\_  
Daniel E. Williams

**ORIGINAL**NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 5

DANIEL E. WILLIAMS (ISB 3920)  
 THOMAS, WILLIAMS & PARK, LLP  
 121 N. 9<sup>th</sup> St., Suite 300  
 P. O. Box 1776  
 Boise, ID 83701  
 Telephone (208) 345-7800  
 Fax: (208) 345-7894  
danw@twplegal.com

NOV 30 2009

J. DAVID NAVARRO, Clerk  
 By CARLY LATIMORE  
 DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
 Liability Company,

Plaintiff ,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
 corporation, JOHN E. BERRYHILL III and  
 AMY BERRYHILL, individually, and as  
 husband and wife,

Defendants.

)  
 ) Case No. CV OC 0909974  
 )  
 ) DEFENDANTS' REPLY  
 ) MEMORANDUM IN SUPPORT OF  
 ) MOTION TO STRIKE PLAINTIFF'S  
 ) THREE-DAY NOTICE OF INTENT  
 ) TO TAKE DEFAULT AND IN  
 ) OPPOSITION TO PLAINTIFF'S  
 ) MOTION FOR SANCTIONS  
 )  
 )  
 )  
 )

Defendants, by and through their counsel of record, hereby submit their Reply

Memorandum in Support of Motion to Strike Plaintiff's Three-Day Notice of Intent to Take

Default and in Opposition to Plaintiff's Motion for Sanctions.

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE  
 PLAINTIFF'S THREE-DAY NOTICE OF INTENT TO TAKE DEFAULT AND IN  
 OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS, P. 1

### **INTRODUCTION**

Plaintiff bases its opposition to Defendants' Motion to Strike Plaintiff's notice of intent to take default and Plaintiff's corresponding motion for sanctions on two faulty premises. First, Plaintiff bewails "a masterful delay campaign" as evidenced by "Mr. Williams' admission that he waited two full weeks after the hearing on October 14, 2009 to consult his calendar and determine he was unavailable on November 18. . ." As the Affidavit of Daniel E. Williams Re: Plaintiff's Motion for Sanctions makes clear, this "admission" is only an assumption of Plaintiff and is incorrect. The second faulty premise is that by filing their memorandum regarding Defendants' Second Motion to Dismiss in line with Rule 7(b)(3)(E), I.R.C.P., Defendants somehow caused further delay. Obviously, if Defendants' Second Motion to Dismiss was not going to be heard until the current hearing date, December 2, 2009, then it caused no further delay for Defendants to file their supporting memorandum in accordance with that date.

The only frivolous and unnecessary time at issue has been spent on Plaintiff's Three-Day Notice of Intent to Take Default when the case was being defended and on Plaintiff's second motion for sanctions.

### **ARGUMENT**

1. **Plaintiff had no basis in fact or law to file a Three-Day Notice of Intent to Take Default.**

Because Defendants' counsel did not write to Defendant until October 29, 2009, regarding the conflict he had with the hearing date originally suggested by the Court, Plaintiff

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE  
PLAINTIFF'S THREE-DAY NOTICE OF INTENT TO TAKE DEFAULT AND IN  
OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS, P. 2



assumes that "he waited two full weeks after the hearing. . . to consult his calendar and determine if he was unavailable. . . ."<sup>1</sup> This statement is simply incorrect. As set forth in the Affidavit of Daniel E. Williams Re: Plaintiff's Motion for Sanctions, filed concurrently, Defendants' counsel checked his calendar and called the Court's chambers the very next day after the relevant hearing was tentatively set. As Defendants stated in their original Memorandum in Support of Defendants' Motion to Strike Three Day Notice of Intent to Take Default and Default Judgment (p. 2),

The Court set a hearing date of November 18, 2009, at 2:45 p.m., although since Defendants' counsel did not have his calendar, the Court specifically indicated that counsel could contact the Court if there was any conflict. . .

\*\*\*

Subsequently, Defendant's counsel did determine he had a serious conflict on the afternoon of November 18, 2009 – a previously calendared hearing on a motion for summary judgment in a class action case in the Federal Court for Idaho. Defendants' counsel contacted the Court's clerk and obtained a new hearing date on Defendants' Second Motion to Dismiss of December 2, 2009, since the Court is apparently unavailable during the intervening week of November 23, 2009.

(emphasis added)

The delay in the hearing was caused by (1) Defendants' counsel's conflict and (2) the Court's unavailability until December 2, 2009, not by any delay on the part of Defendants or their counsel. Plaintiff has failed even to address Defendants' chief argument in support of their motion to strike Plaintiff's notice of intent to take default – that Rule 55(a)(1) only authorizes entry of default when a party "has failed to plead or otherwise defend. . ." Defendants have obviously defended this action and there was no question that Defendants were going to file a

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<sup>1</sup> Response to Defendants' Motion to Strike Plaintiff's Three-Day Notice of Intent to Take Default, p. 2. Subsequent references to this pleading are cited to "Response to Defendants' Motion to Strike" by page number.

Second Motion to Dismiss and that it would be heard. Under these circumstances, there was simply no basis for filing a notice of intent to take default and Plaintiff's Notice should be struck by the Court.

**2. Again, Plaintiff has moved for sanctions without basis.**

As part of its Response to Defendant's Motion to Strike, Plaintiff again moves for sanctions. Earlier, Plaintiff moved for sanctions when Defendants brought their first Motion for Protective Order. Without hearing argument, the Court granted Defendants' Motion for Protective Order. Now, Plaintiff claims that "Mr. Williams' Motion to Strike is without any legal or factual basis, and it appears Mr. Williams has directly misrepresented information to the Court" (Response to Defendants' Motion to Strike: 3). As set forth above, the legal and factual basis for Defendants' Motion to Strike is Plaintiff's failure to take heed of Rule 55(a)(1), I.R.C.P. The alleged "misrepresentation" is that Plaintiff believes Defendants' counsel "apparently claims" that he filed Defendants' Second Motion to Dismiss before knowing Plaintiff planned to attempt to take a default. Nowhere did Defendants' counsel make any such claim. Indeed, as set forth in the Williams Affidavit, Defendants' counsel did receive Plaintiff's letter indicating that it planned to attempt to take a default. In response, in an abundance of caution, Defendants filed their Second Motion to Dismiss and indicated that they would be filing a supporting memorandum in accordance with Rule 7(b)(3).

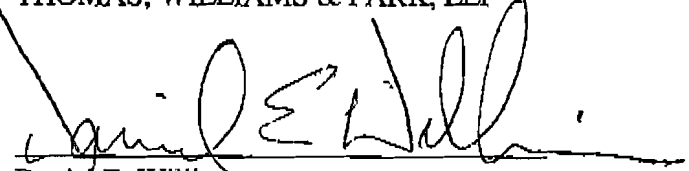
There is simply no basis under Rule 11 or I.C. § 12-123 for Plaintiff to seek sanctions. Defendants submit that Plaintiff's filing of unnecessary and unfounded motions does not represent an "effort to keep the case moving along," as Plaintiff claims (Response to Defendants'

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE  
PLAINTIFF'S THREE-DAY NOTICE OF INTENT TO TAKE DEFAULT AND IN  
OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS, P. 4

Motion to Strike). Instead, these repeated filings only raise the cost of litigation unnecessarily for both sides.

DATED this 30<sup>th</sup> day of November, 2009.

THOMAS, WILLIAMS & PARK, LLP



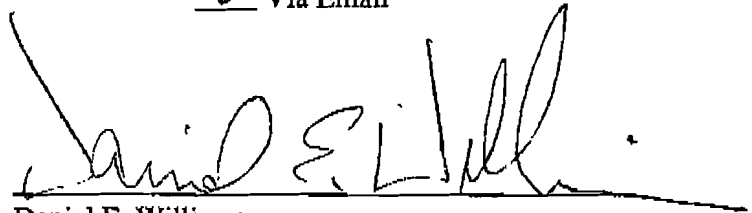
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of November, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

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☒ Via Email



Daniel E. Williams

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE  
PLAINTIFF'S THREE-DAY NOTICE OF INTENT TO TAKE DEFAULT AND IN  
OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS, P. 5

DEC 04 2009

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADAMS  
J. DAVID NAVARRO, Clerk  
By E. CHILD  
DEPUTY

MOSELL EQUITIES, LLC,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
Corporation, JOHN E BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife

Defendants.

Case No. CV OC 0909974

MEMORANDUM DECISION AND ORDER  
REGARDING DEFENDANTS' SECOND  
MOTION TO DISMISS AND MOTION TO  
STRIKE THREE DAY NOTICE OF  
INTENT TO TAKE DEFAULT

Hearing on Defendants' Second Motion to Dismiss and Motion to Strike Three Day Notice of Intent to Take Default was heard on December 2, 2009. Daniel Williams argued on behalf of Defendant and Eric Clark argued on behalf of Plaintiff.

**1) Defendants' Second Motion to Dismiss**

**FACTS AND PROCEDURAL BACKGROUND**

On May 28, 2009, Mosell Equities (Plaintiff) filed a Complaint against Berryhill & Company, John E. Berryhill III, and Amy Berryhill (collectively Defendants) alleging breach of an oral contract, breach of an implied-in-fact contract, quasi-contract—unjust enrichment, and conversion. These allegations are based on the assertions that Mosell Equities made various loans to Berryhill & Company totaling \$405,000 and that Berryhill & Company has not repaid any of this money even though it has been demanded.

Defendants filed a Motion to Dismiss under Idaho Rule of Civil Procedure (I.R.C.P.) 12(b)(6) on July 1, 2009, and the court granted the motion with respect to Count One for breach of oral contract, as well as Count Five for quasi contract and unjust enrichment against John and Amy Berryhill individually. Plaintiff filed a Motion to Reconsider the Court's Dismissal of Defendants John and Amy Berryhill on September 14, 2009. Plaintiff filed notice of service of

the Amended Complaint on October 15, 2009. The Amended Complaint added claims for fraud in the inducement and piercing the corporate veil as well as changed Count One from Breach of Oral Contract to Breach of Contract. At the hearing on Plaintiff's Motion to Reconsider on October 14, 2009, the Court stated that it would wait for Plaintiff to file its Amended Complaint, and for Defendants to file their Motion to Dismiss based on the Amended Complaint, before addressing Plaintiff's Motion to Reconsider.<sup>1</sup> Defendants filed their Second Motion to Dismiss on November 3, 2009, seeking to have the court dismiss John and Amy Berryhill from all claims in their individual capacity. The court does not find grounds to reconsider that decision. Furthermore the Motion to Reconsider was based on the original complaint. The Amended Complaint is now the pleading in this case.

Defendants filed a Memorandum in Support of Second Motion to Dismiss on November 18, 2009. Defendants argue that the Court should dismiss Count Six of the Amended Complaint for Piercing the Corporate Veil because the Plaintiff did not allege facts sufficient to support a claim for piercing the corporate veil. In seeking to have Count Six dismissed, Defendants are also seeking to have all claims against John and Amy individually dismissed. Defendants also argue that Count Five for Fraud in the Inducement should be dismissed because the Plaintiff failed to meet the heightened standard for pleading fraud required under I.R.C.P 9(b).

### LEGAL STANDARD

A motion to dismiss for failure to state a claim upon which relief may be granted may only be granted under Idaho Rule of Civil Procedure 12(b)(6) where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 200 (2005) (quoting *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975)). The court must draw all reasonable inferences in favor of the non-moving party and must determine whether the nonmoving party has stated a claim for relief and alleged all of the essential elements of the claim presented. *Id.*; *Johnson v. Boundary School District 101*, 138 Idaho 331, 334, 63 P.3d 457, 500 (2003). Pursuant to Idaho's notice pleading system, the complaint needs to contain "a concise statement of the facts constituting the cause of action and a demand for relief." *Partout v. Harper*, 145 Idaho 683, 686, 183 P.3d 771, 774 (2008).

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<sup>1</sup> In light of the current procedural status of this case, the Court finds that it is not necessary to decide Plaintiff's Motion to Reconsider.

## ANALYSIS

### **a. Motion to Dismiss Claim for Piercing the Corporate Veil.**

Piercing the corporate veil is “[t]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation’s wrongful acts.” *VFP VC v. Dakota Co.*, 141 Idaho 326, 335, 109 P.3d 714, 723 (2005). To pierce the corporate veil, two requirements must be met: (1) there is “such a unity of interest and ownership that the individuality of such corporation and such person has ceased;” and (2) “it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice.” *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 616, 114 P.3d 974, 986 (2005).

Factors the court should consider when deciding whether to pierce the veil include whether: (1) the sole shareholder acted as the president of the corporation; (2) there were a lack of corporate formalities, such as shareholders’ meetings; (3) the shareholders’ failure to submit corporate contracts to the board of directors; and (4) the transfer of funds or accrual and payment of accounts without approval by any director or officer of the corporation. *Alpine Packing Co. v. H.H. Keim Co.*, 121 Idaho 762, 764, 828 P.2d 325, 327 (Ct. App. 1991) citing *Chick v. Tomlinson*, 96 Idaho 483, 531 P.2d 573 (1973).

The court did find sufficient grounds to justify piercing the corporate veil in *Chick*. In that case, defendant Tomlinson owned several businesses, including a lumber company that employed the plaintiffs. The court found that Tomlinson could be personally liable for debts to the plaintiffs because he was the sole stockholder and president of the corporation and there was no evidence that there had ever been a meeting of a board of directors or that any contracts or decisions had ever been submitted to a board of directors for approval. *Chick*, 96 Idaho at 486, 531 P.2d at 576. The court also found that Tomlinson regularly transferred money between his companies without any formalities or record keeping. *Id.* The court then found that the second, substantial inequities, prong was met because the corporation likely could not obtain the cash necessary to pay the plaintiffs and that the plaintiffs would go without being made whole if Tomlinson was not personally liable for the debts. *Id.*

In the Amended Complaint in this case, the Plaintiff makes several allegations to support its claim for piercing the corporate veil: John and Amy Berryhill are the only officers or directors of Berryhill & Company; John and Amy routinely use corporate assets for their personal use; John and Amy dine and entertain guests at the Berryhill restaurant without paying and take restaurant food and wine home without compensating the corporation; John and Amy

use corporate credit cards to purchase gas for their personal vehicles for non-corporate activities; John and Amy have used corporate funds to pay for improvements to their personal residences; John and Amy use restaurant gift certificates for their personal benefit; and when John signed the contract, attached as exhibit "A" to the Amended Complaint, he did not indicate that he was signing as an officer of Berryhill & Company.

Even when taken as true, Plaintiff has not alleged facts sufficient to support a claim to pierce the corporate veil under the first requirement of *Maroun*. A primary factor Idaho appellate courts focus on in determining whether to pierce the corporate veil is whether corporate formalities have been followed. There is no allegation that corporate formalities were not followed. There is no indication that regular director meetings were not held or that the process used by the corporation to approve transactions was not followed. The fact that John and Amy may have occasionally used company funds or assets for personal use does not rise to the level of such a unity of ownership that the individuality of John or Amy and Berryhill & Company had ceased. Further, Plaintiff has not alleged that these transactions were not approved by the corporation.

The Plaintiff also alleges that the contract signed by John Berryhill is further evidence supporting the claim for piercing the corporate veil. The contract in question is handwritten note below a check from Mosell Equities, LLC payable to "Berryhill & Co." in the amount of \$50,000. The note below the check states

This is a loan from Mosell Equities to cover some misc. downtown expenses during out bookkeeper transition. It will go into the general check register & be used for any billing of payables needed for downtown or Berryhill & Co. It will be transitioned into part of Glenns 'buy in' of Moberry Venture Corp. Inc.

The contract is signed "John Berryhill." This contract does not support the Plaintiff's argument for piercing the veil because John does not need to specifically indicate that he is signing on behalf of the corporation to be free from personal liability. A person signing a contract with another as an agent for a disclosed principal does not become a party to the contract. *General Motors Acceptance Corp. v. Turner Ins. Agency, Inc.*, 96 Idaho 691, 696-97, 535 P.2d 664, 669-70 (1975). A principal is disclosed if, when the contract is entered into, the other party has notice that the agent is acting for a principal and knows the principal's identity. *Id.* at 697, 670. Here, the check is written to Berryhill & Company and the handwritten contract even uses the Berryhill & Company name. John is therefore not personally liable based on his signature on the contract.

The Plaintiff has also failed to plead facts, which even if true, would meet the second *Maroun* requirement. Plaintiff's Amended Complaint merely states that "an inequitable result would follow, and such result would sanction a fraud and promote injustice." Plaintiff does not allege any factual basis for this conclusion. There is no evidence that, as in *Chick*, Berryhill & Company is insolvent or would be unable to satisfy a judgment in favor of the Plaintiff. There does not appear to be any evidence that continuing to recognize the legal fiction of Berryhill & Company would promote a fraud or injustice.

The Court therefore grants Plaintiff's Motion to Dismiss as to Count Six of Plaintiff's Amended Complaint for Piercing the Corporate Veil.

**b. Motion to Dismiss Claim for Fraud in the Inducement**

A claim of fraud must be stated with particularity under Idaho Rule of Civil Procedure 9(b). The prima facie case for fraud consists of:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge about its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearers ignorance of its falsity; (7) his reliance on the [representation]; (8) his rights to rely thereon; (9) his consequent and proximate injury.

*Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005). The "party alleging fraud must support the existence of each of the elements of the cause of action for fraud by pleading with particularity the factual circumstances constituting fraud." *Id.* This includes the actual statements or representations allegedly made, what made those statements false, and when and why they were made. *See Witt v. Jones*, 111 Idaho 165, 168 – 69, 722 P.2d 474, 477 – 78 (1986). A claimant cannot satisfy the pleading requirements of Rule 9(b) by merely reciting the elements of a prima facie case for fraud. *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 128, 106 P.3d 449, 454 (2005).

In this case, it appears as though the Plaintiff has met the heightened pleading requirement of Rule 9(b). The Plaintiff has alleged facts in the Amended Complaint with particularity that support the existence of each of the elements of fraud. Defendants point out that the Plaintiff may have misquoted the contract in paragraph 34 of the Amended Complaint, however, that is not dispositive of whether Plaintiff has met the pleading requirement. The handwritten contract specifically says that the \$50,000 check from Mosell Equities to Berryhill & Company is a loan. Plaintiff sufficiently plead that there was a representation in paragraph 34



of the Amended Complaint. Because Plaintiff met the heightened pleading requirement of Rule 9(b) in its Amended Complaint Defendants' Motion to Dismiss Count Five is denied.

**2) Defendants' Motion to Strike Three Day Notice of Intent to Take Default and Default Judgment**

**FACTS AND PROCEDURAL BACKGROUND**

Plaintiff filed a Three Day Notice of Intent to Take Default and Default Judgment on November 3, 2009. In it, Plaintiff states that it served the Defendants with its Amended Complaint on October 15, 2009, and that I.R.C.P. 15 requires a response to an amended complaint within ten days. Plaintiff acknowledges, however, that it gave the Defendants 20 days to respond. Plaintiff states that Defendants indicated that they did not plan on responding within the 20 day deadline, so Plaintiff filed a Notice of Intent to Take Default and Default Judgment.

Defendants responded on November 3, 2009, with a Motion to Strike the Three Day Notice of Intent to take Default, and supporting memorandum and affidavit. Defendants state that at the hearing on October 14, 2009, the Court gave the Defendants until November 4, 2009, to file a second motion to dismiss. Defendants did file their Second Motion to Dismiss on November 3, 2009, but did not file supporting memorandum. Defendants state that they informed Plaintiff's counsel on November 3, 2009, that they would not be filing their supporting memorandum until two weeks prior to the hearing, in accordance with Rule 7(b)(3)(E). Defendants claims that that is when Plaintiffs filed their Three Day Notice of Intent to Take Default.

Plaintiff then responded on November 10, 2009, arguing that the Court must deny Defendants' Motion to Strike as the Plaintiff's Three-Day Notice was timely filed and appropriate. Plaintiff argues that the Defendants are conducting a "masterful delay campaign" because the hearing for Defendants Second Motion to Dismiss was originally scheduled for November 18, and counsel for Defendants waited until two weeks prior to the scheduled hearing to notify the Court that they were unavailable and to reschedule the hearing for December 2, 2009. Plaintiff then goes on to argue that he filed his Three Day Notice before Defendants filed their second motion to dismiss.<sup>2</sup> Plaintiff also seeks attorney fees under I.R.C.P 11 and Idaho Code section 12-123, on the ground that Defendants Motion to Strike is without any legal or factual basis

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<sup>2</sup> The parties dispute the exact timing of when the Notice of Intent to Take Default and second Motion to Dismiss were filed and who received which filing first. However, that is not relevant with respect to this motion.

### LEGAL STANDARD

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the court, shall order entry of default against the party. Default shall not be entered against a party who has appeared in the action unless that party . . . has been served with three (3) days written notice of the application for entry of such default.

IDAHO R. CIV. P. 55(a)(1).

### ANALYSIS

Under IRCP 55(a)(1), the court shall enter default when the party “has failed to plead or otherwise defend as provided by these rules. . . .” However, “[d]efault shall not be entered against a party who has appeared in the action unless that party . . . has been served with three (3) days written notice of the application for entry of default.” IDAHO R. CIV. P. 55(a)(1). Every defense shall be asserted in a responsive pleading except that certain enumerated defenses shall be made by motion. IDAHO R. CIV. P. 12(b). A party has 20 days to respond to an amended complaint. However, the service of a 12(b)(6) motion alters the period to respond to the amended complaint. IDAHO R. CIV. P. 12(a).


In this case, the Defendants filed their Second Motion to Dismiss within the 20 days allowed by the Court and within three days of Plaintiff’s Three Day Notice of Intent to Take Default. Pursuant to 12(a) the defendants now have ten days after notice of the court’s decision on their Second Motion to Dismiss to file an Answer to the Amended Complaint. The three day notice of intent to take default is now moot. However, Plaintiffs may file another three day notice if no answer is filed within the time required by 12(a).

### CONCLUSION

Count Six is dismissed. The motion to dismiss Count Five is denied. The Motion to Strike Three Day Notice of Intent to Take Default is moot.

IT IS SO ORDERED

Dated this 4<sup>th</sup> day of December 2009.

  
Darla Williamson, District Judge

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

Eric R. Clark  
P.O. Box 2504  
Eagle, Idaho 83616

Dan Williams  
P.O. Box 1776  
Boise, Idaho 83701

Dated this 4<sup>th</sup> day of December 2009

E. Chill  
Deputy Court Clerk

TIME RECEIVED December 10, 2009 4:03:47 PM MST	REMOTE CSID 208 939-7136	ATTENTION 88 NO	PAGES 2	STATUS Received
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Sent by: CLARK & ASSOCIATES, ATTORNEYS 208 939-7136 12/10/2009 4:01:54 PM Page 1 of 2

**ORIGINAL**

**DEC 10 2009**

**J. DAVID NAVARRO, Clerk**  
By R. WRIGHT  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**NOTICE OF SERVICE OF  
PLAINTIFF 'S SECOND SET OF  
DISCOVERY REQUESTS TO  
DEFENDANTS**

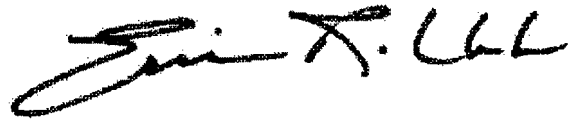
PLEASE TAKE NOTICE the Plaintiff has forwarded a true and correct copy of  
PLAINTIFF'S SECOND SET OF DISCOVERY TO DEFENDANTS as provided by  
Rules 33 and 34 of the Idaho Rules of Civil Procedure on this date to the Defendants via  
facsimile transmission to the Defendants' attorney of record.

NOTICE OF SERVICE OF PLAINTIFF 'S SECOND SET OF DISCOVERY REQUESTS TO  
DEFENDANTS - 1

000247

DATED this 10th day of December, 2009.

CLARK & ASSOCIATES, ATTORNEYS

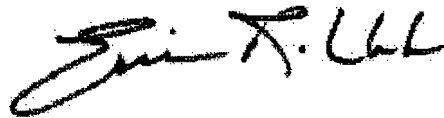


Eric R. Clark

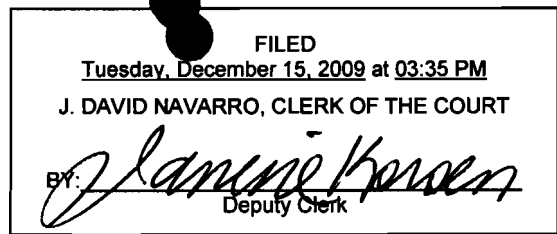
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of September, 2009, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



ERIC R. CLARK



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES LLC  
Plaintiff,  
vs.  
BERRYHILL & COMPANY INC  
JOHN E BERRYHILL III  
AMY BERRYHILL  
Defendant.

CASE NO. CV-OC-2009-09974

NOTICE OF TRIAL SETTING  
AND ORDER GOVERNING  
FURTHER PROCEEDINGS

This case is hereby set for:

**JURY TRIAL.....MONDAY, JUNE 21, 2010 @ 08:30 AM** for 8  
days.

IT IS HEREBY FURTHER ORDERED that all parties shall  
stipulate to all cut off dates and file said stipulation with  
this Court.

IT IS HEREBY FURTHER ORDERED:

**A. TRIAL EXHIBITS**

(Marked Trial Exhibits) Before trial, each party shall call  
the Judge's clerk or secretary at 287-7564 to find out how to  
mark their exhibits and shall pre-mark all exhibits the party  
intends to offer into evidence using evidence stickers of the  
type used by the Clerk's Office.

(List of trial exhibits) At least one (1) week before the  
beginning of the trial, each party shall file a list of the  
exhibits the party intends to offer into evidence. The list  
shall identify each exhibit by exhibit number and a description  
of the exhibit. Counsel will retain the exhibits until the day  
of trial and not lodge the actual exhibits with the clerk.

**B. DRAWING JURORS**

Jurors names for seating order will be randomly drawn by the computer before the date of trial. If counsel intend to observe this process, they must contact the court clerk.

**C. VOIR DIRE**

Voir Dire of respective jurors by counsel will be limited to a total of **45 minutes** per side, unless otherwise ordered by the court.

**D. TRIAL PROCEEDINGS**

(Hours of Trial) Trials scheduled for six days or more will be conducted from 9:00 a.m. to 2:00 p.m., EXCEPT ON THE FIRST DAY OF TRIAL AND THE LAST DAY OF TRIAL, with two 15-minute breaks. Trials of five days or less will be conducted from 9:00a.m. to 5:00 p.m.

(No trial proceedings on Thursdays) Unless otherwise specified, no trial proceedings will take place on Thursdays because of the Court's criminal arraignment and civil motion calendars.

**E. DOUBLE-SETS**

This case has been **double-set** with other cases. Because of statutory and constitutional speedy trial requirements, criminal cases will have preference over civil trials.

**F. OBJECTIONS TO TRIAL DATE**

ANY OBJECTION TO THE TRIAL DATE MUST BE FILED AND SERVED WITHIN FOURTEEN (14) DAYS AFTER THE DATE OF SERVICE OF THIS ORDER AND MUST BE ACCOMPANIED BY A LIST OF UNAVAILABLE DATES OF THE PARTY MAKING THE OBJECTION. IF THERE IS A TIMELY OBJECTION, THEN ALL OTHER PARTIES WILL HAVE SEVEN (7) DAYS AFTER THE SERVICE OF SUCH OBJECTION TO FILE WITH THE COURT THEIR UNAVAILABLE DATES TO BE CONSIDERED IN ANY RESCHUDULING. FAILURE TO TIMELY OBJECT WILL WAIVE ANY OBJECTION TO THE TRIAL DATE.

Notice is hereby given, pursuant to Idaho Rule of Civil Procedure 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case. The following is a list of potential alternate judges:

Hon. Phillip M. Becker  
Hon. G.D. Carey  
Hon. Dennis Goff  
Hon. Nathan Higer  
Hon. Daniel C. Hurlbutt, Jr.  
Hon. James Judd  
Hon. D. Duff McKee  
Hon. Daniel Meehl  
Hon. George R. Reinhardt, III  
Hon. Ronald Schilling  
Hon. W. H. Woodland  
All Fourth Judicial District Judges

Unless a party has previously exercised their right to disqualification without cause under Rule 40(d)(1), each party shall have the right to file one(1) motion for disqualification without cause as to any alternate judge not later than ten(10) days after service of this notice.

Dated Tuesday, December 15, 2009.

*Darla S. Williamson*

---

DARLA WILLIAMSON  
District Judge



**CERTIFICATE OF MAILING**

I hereby certify that on Tuesday, December 15, 2009, I  
Mailed (served) a true and correct copy of the within instrument  
to:

ERIC R CLARK  
ATTORNEY AT LAW  
PO BOX 2504  
EAGLE ID 83616

DANIEL E WILLIAMS  
ATTORNEY AT LAW  
PO BOX 1776  
BOISE ID 83701

J. DAVID NAVARRO  
Clerk of the District Court

By:   
Deputy Court Clerk

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants/Counterclaimant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

BERRYHILL & COMPANY, INC., an Idaho  
corporation,

Counterclaimant,

vs.

Case No. CV OC 0909974

ANSWER, COUNTERCLAIM  
AND DEMAND FOR JURY  
TRIAL

ANSWER, COUNTERCLAIM AND DEMAND FOR JURY TRIAL, P. 1

000253



7. Defendants admit that Mosell Equities wrote more checks to Berryhill & Company, Inc., and that they appear to total \$405,000.00.

8. Defendants admit that John Berryhill and Glenn Mosell had discussions regarding a company called Moberry, but deny any and all remaining allegations in Paragraph 8.

9. Defendants admit that Victoria Meyers was retained and drafted certain documents, which were not executed.

10. Defendants deny Paragraph 10.

11. Defendants admit that Glenn Mosell wrote the word "loan" on certain checks to Berryhill & Company, Inc., but deny any and all remaining allegations in Paragraph 11.

12. Defendants admit that certain financial records of Berryhill & Company, Inc., categorized the funds as obligations to Mosell or Mosell Equities, LLC, but deny any and all remaining allegations in Paragraph 12.

13. Defendants admit that Mosell Equities provided written demand before filing this action, that Berryhill & Company, Inc., refused to comply with said demand, but deny any and all remaining allegations in Paragraph 13.

14. Defendants deny Paragraph 14.

15. Defendants deny Paragraph 15.

16. As Paragraph 16 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 16.

17. As Paragraph 17 pertains only to Defendant Berryhill & Company, Inc., said Defendant admits that it responded that no actual loan existed and refused to comply with Plaintiff's demand, but denies any and all remaining allegations in Paragraph 17.

18. As Paragraph 18 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 18.

19. As Paragraph 19 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 19.

20. Defendants deny Paragraph 20.

21. As Paragraph 21 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 21.

22. As Paragraph 22 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 22.

23. As Paragraph 23 pertains only to Defendant Berryhill & Company, Inc., said Defendant admits that it has refused to comply with Plaintiff's demand, but denies any and all remaining allegations in Paragraph 23.

24. As Paragraph 24 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 24.

25. Defendants deny Paragraph 25.

26. As Paragraph 26 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 26.

27. As Paragraph 27 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 27.

28. As Paragraph 28 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 28.

29. Defendants deny Paragraph 29.

ANSWER, COUNTERCLAIM AND DEMAND FOR JURY TRIAL, P. 4

30. As Paragraph 30 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 30.

31. As Paragraph 31 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 31.

32. As Paragraph 32 pertains only to Defendant Berryhill & Company, Inc., said Defendant denies Paragraph 32.

33. Defendants deny Paragraph 33.

34. Defendants deny Paragraph 34.

35. Defendants deny Paragraph 35.

36. Defendants deny Paragraph 36.

37. Defendants admit that Berryhill & Company, Inc., refused to comply with Plaintiff's demand, but deny any and all remaining allegations of Paragraph 37.

38. Defendants deny Paragraph 38.

39. Defendants deny Paragraph 39.

40. Defendants deny Paragraph 40.

41. Defendants deny Paragraph 41.

[Paragraphs 42 through 54 were dismissed by the Court and no answer to these paragraphs is required]

55. Defendants deny Paragraph 55.

**Response to Plaintiff's Prayer for Relief**

Defendants deny that Plaintiff is entitled to any of the damages or other relief sought in its prayer, and/or for any damages whatsoever based on the allegations in the Complaint.

ANSWER, COUNTERCLAIM AND DEMAND FOR JURY TRIAL, P. 5

### **Request for Attorneys Fees and Costs**

Defendants have been forced to incur attorney fees related to the defense of this matter. Defendants are entitled to recover their reasonable costs and attorney fees incurred in this matter pursuant to Rule 54, I.R.C.P., as well as Idaho Code §§ 12-120, 12-121, and/or other applicable law.

### **DEFENSES AND AFFIRMATIVE DEFENSES**

- A. Plaintiff's claims are barred, in whole or in part, by failure to state a claim upon which relief may be granted.
- B. Plaintiff is not the real party in interest to some or all of its claims.
- C. Plaintiff's claims are barred, in whole or in part, by mistake and/or lack of meeting of the minds.
- D. Plaintiff's claims are barred, in whole or in part, by novation.
- E. Plaintiff's claims are barred, in whole or in part, by misrepresentation and/or fraud.
- F. Plaintiff's claims are barred, in whole or in part, by breach of contract.
- G. Plaintiff's claims are barred, in whole or in part, by abandonment and/or rescission.
- H. Plaintiff's claims are barred, in whole or in part, by the statute of frauds.
- I. Plaintiff's claims are barred, in whole or in part, by unconscionability.
- J. Plaintiff's claims are barred, in whole or in part, by accord and satisfaction.
- K. Plaintiff's claims are barred, in whole or in part, by waiver, estoppel, laches and/or unclean hands.

L. Defendants reserve the right to assert additional affirmative defenses and defenses that may become apparent during the course of this lawsuit, including affirmative defenses set forth in Rule 8(c), I.R.C.P.

### **DEMAND FOR JURY TRIAL**

Defendants demand a trial by jury regarding Plaintiff's claims and their defenses.

### **COUNTERCLAIM**

For its Counterclaim against Counterdefendant, Berryhill & Company, Inc., claims and alleges as follows:

### **PARTIES, JURISDICTION AND VENUE**

1. Counterclaimant Berryhill & Company, Inc. ("Berryhill & Company"), is an Idaho corporation doing business in Boise, Ada County, Idaho. At all relevant times, the President of Berryhill & Company was John E. Berryhill III ("John Berryhill").

2. Counterdefendant Mosell Equities, L.L.C. ("Mosell Equities"), is an Idaho limited liability company, whose sole owner and member, upon information and belief, is Glenn Eric Mosell ("Mosell"). Mosell is an agent of Mosell Equities and all of the actions and omissions of Mosell are attributable to Mosell Equities.

3. All jurisdictional requirements for the District Court are satisfied.

4. Venue is proper in Ada County pursuant to, *inter alia*, Idaho Code § 5-404.

### **FACTUAL ALLEGATIONS**

5. Counterclaimant Berryhill & Company incorporates paragraphs 1 through 4 above.

6. In approximately July, 2005, Mosell, on behalf of Mosell Equities, approached



Berryhill & Company, through John Berryhill, to propose a joint effort in the development of land near Sunnyslope in Canyon County, Idaho, including a winery, hotel and restaurant and related projects to be known as "Polo Cove."

7. Mosell represented, on behalf of Mosell Equities, that Mosell Equities itself owned substantial real estate holdings in the proposed Polo Cove development, which representation Counterclaimant now believes to have been false.

8. Over the ensuing months, it was agreed that Mosell's main focus in the Polo Cove development would be financing. It was also agreed that Berryhill & Company, through John Berryhill, would provide operational support, including dealing with vendors, vintners, architects, designers, realtors, as well as other interested parties.

9. Between July, 2005, and approximately July, 2008, Berryhill & Company, through John Berryhill, devoted substantial time to the operational support of the Polo Cove development.

10. Mosell Equities agreed to compensate Berryhill & Company for the time devoted by John Berryhill to the operational support of the Polo Cove development.

11. Mosell Equities caused business cards to be printed for John Berryhill identifying John Berryhill as a "Partner" in Polo Cove.

12. As an integral part of the Polo Cove development, Mosell Equities and Berryhill & Company agreed that the restaurant operated by Berryhill & Company would relocate from Broadway Avenue in Boise, Idaho, to a downtown location in Boise, Idaho.

13. Mosell Equities desired a larger, more impressive location and restaurant site to lure investors and others into investing in and otherwise becoming part of the Polo Cove

development.

14. Mosell Equities agreed to provide funds to relocate the restaurant to a downtown location and to make tenant improvements and provide capital for other necessary expenditures associated with the move to a new location.

15. As part of the restaurant relocation and joint effort with regard to Polo Cove, Mosell executed a personal guaranty regarding the leasehold at the new downtown location, a true and correct copy of which is attached as Exhibit A.

16. Pursuant to the agreement relating to Polo Cove, after the relocation of the Berryhill & Company restaurant, Mosell and potential investors in Polo Cove and other guests were provided meals and drinks at no cost by Berryhill & Company.

17. Subsequently, Mosell Equities indicated a desire to lease additional space at the new location for a Polo Cove showroom.

18. Mosell Equities intentionally induced Berryhill & Company to add the additional showroom space to its existing obligation to the building owner based on the representations, assurances and understandings set forth herein.

19. Mosell Equities provided reimbursement to Berryhill & Company for the showroom rent for a time, but quit doing so in approximately July, 2008.

20. When Mosell Equities provided funds for the restaurant relocation, Mosell, on behalf of Mosell Equities, instructed Berryhill & Company to classify the funds as a "loan," saying that "we have to call it something."

21. The funds provided by Mosell Equities were not intended to constitute a loan, but rather an investment by Mosell Equities into the joint effort at developing Polo Cove.

22. By insisting on calling the funds a “loan” or loans, while assuring Berryhill & Company that they would constitute the contribution of Mosell Equities in the Polo Cove effort, Mosell Equities induced Berryhill & Company to accept the funds under false pretenses.

23. Based on the statements of Mosell on behalf of Mosell Equities, Berryhill & Company did not expect that the funds provided by Mosell Equities would constitute an actual loan to be repaid upon demand of Mosell Equities.

### **FIRST CLAIM FOR RELIEF**

(Fraud in the inducement)

24. Counterclaimant incorporates paragraphs 1 through 23 above.

25. Mosell Equities, by its agent Mosell, represented, assured and knowingly gave reason for Berryhill & Company to believe that the funds it was providing to Berryhill & Company constituted a portion of its investment in the Polo Cove development and that, despite terming them at times as a “loan” or loans, Mosell Equities intended that they would be “transitioned” into the joint effort to develop Polo Cove.

26. The above representation was false in that Mosell Equities did not intend the funds to be transitioned, but intended that they constitute loans subject to repayment upon demand by Mosell Equities.

27. The above representation was material because Berryhill & Company would not have accepted the funds, relocated to a new and larger location and increased the overhead of its restaurant and catering operations if the funds constituted a loan by a lender.

28. Mosell Equities knew that its representations were false and that it intended to treat the funds as loan.

29. Mosell Equities intended that Berryhill & Company rely on its assurances and representations regarding the funds.

30. Berryhill & Company was not aware that the assurances and representations of Mosell Equities was false and relied upon them as true.

31. Berryhill & Company had a right to rely on the assurances and representations of Mosell Equities.

32. As a direct and proximate result of the acts and omissions of Mosell Equities, Counterclaimant Berryhill & Company has sustained and continues to sustain damages in an amount to be proven at trial.

#### **ATTORNEY FEES AND COSTS**

33. Berryhill and Company has been required to retain legal counsel to prosecute its claims and is entitled to recover its reasonable costs and attorneys fees incurred in this matter pursuant to Rule 54, I.R.C.P., as well as Idaho Code §§ 12-120, 12-121, and/or other applicable law.

#### **PRAYER**

WHEREFORE, Berryhill & Company prays for relief from the Court as follows:

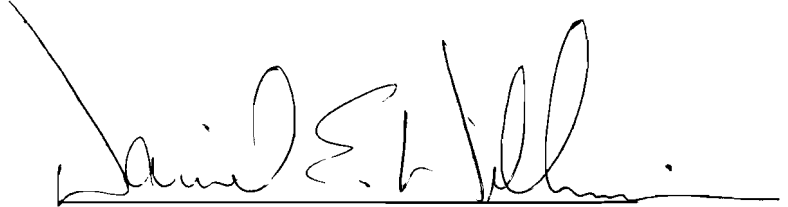
1. For an award of damages in favor of Berryhill & Company in an amount to be proven at trial;
2. For an award of reasonable attorney fees and costs and interest;
3. For such further relief as the Court deems just.

**DEMAND FOR JURY TRIAL**

Counterclaimant demands a trial by jury.

DATED this 21<sup>st</sup> day of December, 2009.

THOMAS, WILLIAMS & PARK, LLP



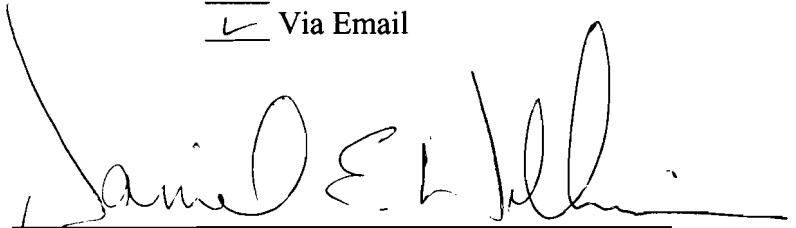
Daniel E. Williams  
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of December, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☐ Via Facsimile: 939-7136  
☒ Via U.S. Mail  
☒ Via Email



Daniel E. Williams

## PERSONAL GUARANTY

In consideration for, and as an inducement to SECURITY, LLC, (hereinafter "Landlord") as Landlord, to enter into a Lease with BERRYHILL & COMPANY, INC., (hereinafter "Tenant") as Tenant, the undersigned (hereinafter the "Guarantors") hereby guaranty, the full performance and observance of all terms, covenants, conditions, and agreements of the Tenant in the Lease entered into by Berryhill & Company, Inc. as Tenant for the Premises therein described. The undersigned waives any notice of non-payment, non-performance, or proof of notice or demand and any other defense which may otherwise be available under the principles of guarantee or surety law which would operate to impair or diminish the liability under this Guaranty and further agrees that Landlord may proceed against the undersigned separately or jointly before, after or simultaneously with proceeding against Tenant.

This Guaranty is unconditional and shall remain in full force and effect on any change order, amendment, assignment, sublease, transfer, or other modification of said Lease, whether or not Guarantors have knowledge thereof; provided, however, that notwithstanding any other provision hereof to the contrary, this Guaranty shall expire and have no further force or effect with respect to obligations accruing under the Lease during any extension or renewal of the term thereof unless Berryhill & Company, Inc. or a successor entity in which the Guarantors have retained an ownership interest, is the Tenant under the Lease during the renewal or extension of the term thereof. This Guaranty shall remain in full force and effect with respect to all amounts due by Tenant until and if Landlord has expressly released Tenant regardless of any change in the legal structure of Tenant or the existence of entities or individuals legally distinct from Tenant.

If Landlord takes any action to enforce or compel compliance with the terms of this Guaranty or any other Contract with Landlord, the Guarantors shall be obligated to pay all costs incurred by Landlord and attorney's fees due from Guarantors, in addition to any other rights or remedies which Landlord may have. Guarantors expressly agrees that the forum for any litigation pursuant to this Guaranty or any Contract between Landlord and Tenant, whether suit is brought by Landlord, Tenant, or Guarantors, shall be the County of Ada, Idaho. This Guaranty shall be governed by and construed in accordance with the laws of the state of Idaho.

The undersigned agrees that their liability hereunder is joint and several, with the Tenant. The undersigned have waived the right to apply for individual credit, and hereby waives any rights they may have under the Equal Credit Opportunity Act to void this Guaranty. All obligations and liabilities of Guarantor pursuant to this Guaranty shall be binding upon their heirs, personal representatives, and assigns. The undersigned understand that Landlord may refuse to extend credit at any time and from time to time, that such refusal shall not effect the obligations hereunder, and that Landlord may obtain credit reports and other credit information on the undersigned from time to time.

Guarantors agree that this Guaranty is provided not in payment of, but as additional security for and/or evidence of obligations due to the Landlord under existing Lease with Tenant and that this Guaranty is not accepted in lieu of any mechanic's lien, payment bond or other legal rights.

IN WITNESS WHEREOF, we have signed and sealed this Guaranty this 12<sup>th</sup> day of April, 2007.

GUARANTORS:

  
John Berryhill

  
Glenn Mosell

EXHIBIT

A

DEC. 24. 2009 10:24AM

NO. 7952 -P. 2- - - -

**ORIGINAL**

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_  
**ORIGINAL**  
FILED P.M. 12/3

DEC 24 2009

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF SERVICE  
OF DISCOVERY

TO: CLERK OF THE DISTRICT COURT

YOU ARE HEREBY NOTIFIED that on the 24th day of December, 2009, I caused to be  
served by U.S. Mail, postage prepaid, to Eric R. Clark a true and correct copy of Defendant's  
Supplemental Answers to Plaintiff's First Set of Interrogatories and Requests for Production of

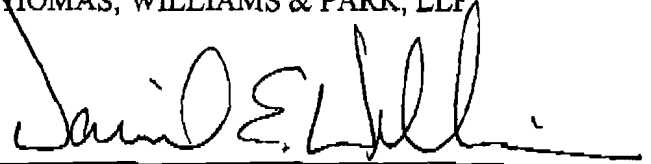
NOTICE OF SERVICE OF DISCOVERY, P. 1

000266

Documents.

DATED this 24<sup>th</sup> day of December, 2009.

THOMAS, WILLIAMS & PARK, LLP



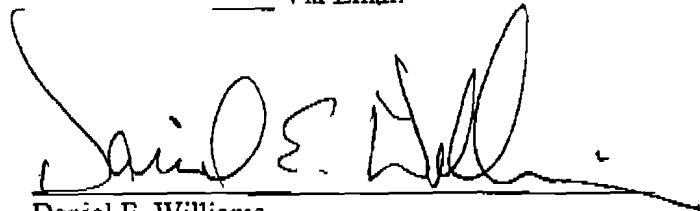
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of December, 2009, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☐ Via Facsimile: 939-7136  
☒ Via U.S. Mail  
☐ Via Email



Daniel E. Williams



**JAN 05 2010****J. DAVID NAVARRO, Clerk**  
By **L. AMES**  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**NOTICE OF DEPOSITION:  
JOY LUEDTKE**

Judge Williamson

TO: JOY LUEDTKE

PLEASE TAKE NOTICE that counsel for Plaintiff Mosell Equities, LLC, will take the testimony upon oral examination of Joy Luedtke pursuant to the Idaho Rules of Civil Procedure, before an officer authorized to administer oaths on Wednesday, January 13, 2010 at 10:00 a.m. at the Carty Law Office, 380 S. 4<sup>th</sup> St, Boise, Idaho.

NOTICE OF DEPOSITION: JOY LUEDTKE - 1

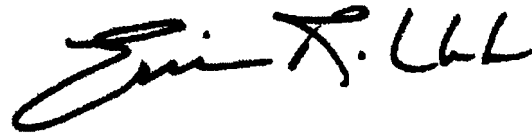
**ORIGINAL**

000268

The deposition will be for all purposes authorized under the Idaho Rules of Civil Procedure.

Dated this 5th day of January, 2010.

CLARK & ASSOCIATES, ATTORNEYS



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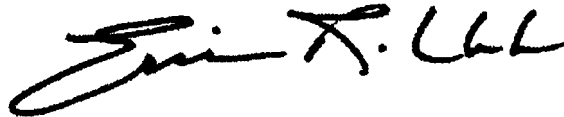
Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 5th day of January, 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701

Burnham Habel & Associates Inc.  
6027 W. Clinton St  
Boise, ID 83704-9306



---

ERIC R. CLARK

**TIME RECEIVED**  
January 5, 2010 2:36:40 PM MST

**REMOTE CSID**  
208 939-7136

**DURATION**  
158

**PAGES**  
4

**STATUS**  
Received

Sent by: CLARK & ASSOCIATES, ATTORNEYS

208 939-7136

1/5/2010 2:32:43 PM

Page 1 of 4

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**SUBPOENA:  
JOY LUEDTKE DEPOSITION**

Judge Williamson

The State of Idaho to: Joy Luedtke:

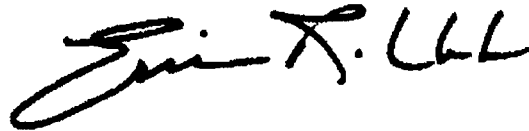
YOU ARE COMMANDED to appear at the place, date and time specified below to  
testify at the taking of a deposition in the above case.

PLACE, DATE AND TIME: Carty Law Office, 380 S. 4<sup>th</sup> St, Boise, Idaho, Wednesday,  
January 13, 2010 at 10:00 a.m.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this 5th day of January, 2010.

CLARK & ASSOCIATES, ATTORNEYS




---

Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 5th day of December, 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
 121 N. 9<sup>th</sup> St., Suite 300  
 P. O. Box 1776  
 Boise, ID 83701  
 Telephone (208) 345-7800  
 Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

**Attorneys for Defendants**

NO. \_\_\_\_\_  
 A.M. \_\_\_\_\_ FILED P.M. 5

**JAN 11 2010**

**J. DAVID NAVARRO, Clerk**  
 By E. HOLMES  
 DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,**  
**Liability Company,**

**Plaintiff ,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho**  
**corporation, JOHN E. BERRYHILL III and**  
**AMY BERRYHILL, individually, and as**  
**husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**NOTICE OF SERVICE**  
**OF DISCOVERY**

**TO: CLERK OF THE DISTRICT COURT**

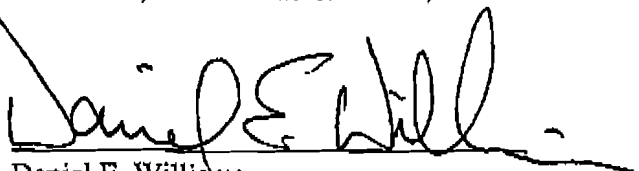
**YOU ARE HEREBY NOTIFIED** that on the 11th day of January, 2010, I caused to be served by U.S. Mail, postage prepaid, and by email to Eric R. Clark the original and a copy of Defendant's Answers to Plaintiff's Second Set of Interrogatories and Requests for Production of  
**NOTICE OF SERVICE OF DISCOVERY, P. 1**

*ml*

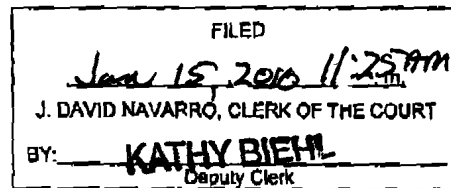
Documents, along with a copy of this notice.

DATED this 11<sup>th</sup> day of January, 2010.

THOMAS, WILLIAMS & PARK, LLP

A handwritten signature in black ink, appearing to read "Daniel E. Williams", written over a horizontal line.

Daniel E. Williams  
Attorney for Defendants



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES LLC,  
Plaintiff,  
vs.  
BERRYHILL & COMPANY INC,  
JOHN E BERRYHILL III,  
AMY BERRYHILL,  
Defendant.

Case No. CV-OC-2009-09974

STIPULATION FOR SCHEDULING  
AND PLANNING

The above parties hereby stipulate to the following scheduling deadlines:

A. EXPERT WITNESSES

(Plaintiff's experts)

1. 90 days before trial, plaintiff shall disclose each person plaintiff intends to call as an expert witness at trial and state the subject matter on which the witness is expected to testify.

2. 90 days before trial, plaintiff shall disclose all information required by Rule 26(b)(4) of the Idaho Rules of Civil Procedure regarding expert witnesses.

3. 60 days before trial, defendant shall complete any depositions of the plaintiff's initial expert witnesses.

(Defendant's experts)

4. 60 days before trial, defendant shall disclose each person defendant intends to call as an expert witness at trial and state the subject matter on which the witness is expected to testify.

5. 60 days before trial, defendant shall disclose all information required by Rule 26(b)(4) of the Idaho Rules of Civil Procedure regarding expert witnesses.

6. 30 days before trial, plaintiff shall complete any depositions of the defendant's expert witnesses.

**(Plaintiff's rebuttal experts)**

7. 30 days before trial, plaintiff shall disclose each person plaintiff intends to call as an expert witness at trial to rebut new information or issues disclosed or raised by the defendant.

8. 30 days before trial, plaintiff shall disclose all information required by Rule 26(b)(4) of the Idaho Rules of Civil Procedure regarding the rebuttal expert witnesses.

9. 15 days before trial, defendant shall complete any depositions of the plaintiff's rebuttal expert witnesses.

**B. LAY WITNESSES**

1. 30 days before trial, plaintiff shall disclose each person plaintiff intends to call as a lay witness at trial (excluding impeachment witnesses).

2. 30 days before trial, defendant shall disclose each person defendant intends to call as a lay witness at trial (excluding impeachment witnesses).

3. 15 days before trial, plaintiff shall disclose each lay witness (excluding impeachment witnesses) plaintiff intends to call at trial to rebut new information or issues disclosed or raised by the defendant.

4. 15 days before trial, all parties shall complete any depositions of lay witnesses.

**C. DEADLINES FOR INITIATING DISCOVERY**

1. 45 days before trial is the last day for serving interrogatories, requests for production, requests to permit entry upon land or other property, and requests for admission.

2. 45 days before trial is the last day for filing motions for a physical or mental examination.

**D. DEADLINE FOR SUPPLEMENTAL RESPONSES TO DISCOVERY**

1. 30 days before trial, all parties must serve any supplemental response to discovery required by Rule 26(e) of the Idaho Rules of Civil Procedure.

**E. STIPULATIONS TO ALTER DISCOVERY DEADLINES**



1. The parties may alter any discovery deadline by written agreement without the necessity of obtaining a court order.

#### F. PRETRIAL MOTIONS

1. 60 days before trial is the last day to file motions to add additional parties to the lawsuit.

2. 60 days before trial is the last day to file a motion to amend the claims between existing parties to the lawsuit, including to add a claim for punitive damages.

#### G. MOTIONS FOR SUMMARY JUDGMENT

1. All motions for summary judgment must be filed at least ninety-one (91) days before trial.

#### H. TRIAL SETTING

1. This case can be set for a trial to commence on or after June 21, 2010 at 8:30 a.m. (The trial must be set within 18 months from the date the complaint was filed.)

2. It is estimated that the trial will take 8 days.

3. This case is to be tried as a:

☐ court trial

☒ jury trial

4. Parties preference for trial dates: \_\_\_\_\_

#### I. MEDIATION

1. The parties agree to mediation: yes \_\_\_\_\_ no \_\_\_\_\_

2. If yes:

a. The parties agree to submit to mediation with a mediator mutually agreed upon.

b. Mediation shall begin \_\_\_\_\_ days prior to trial.

c. Unless otherwise agreed in writing between the parties, the cost of mediation shall be equally divided between the parties.

The parties reserve the right to amend this stipulation by agreement of all parties, subject to Court approval; each party reserves the right to seek amendment hereof by Court order, and to request further status conferences for such purpose, in accordance with I.R.C.P. 16(a) and 16(b).

Dated this 15<sup>th</sup> day of January, 2008<sup>10</sup>.

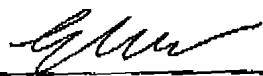
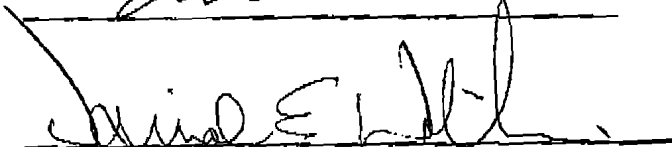
Appearances:

Counsel for Plaintiff(s)

Attorney at Law

Counsel for Defendant(s)

Attorney at Law

JAN. 15. 2010 3:22PM

NO. 8027 - P. 2

NO.

A.M.

**ORIGINAL**

JAN 15 2010

J. DAVID NAVARRO, Clerk  
By R. WRIGHT  
DEPUTY

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF SERVICE  
OF DISCOVERY

TO: CLERK OF THE DISTRICT COURT

YOU ARE HEREBY NOTIFIED that on the 15th day of January, 2010, I caused to be served, by U.S. Mail, postage prepaid, and by email, upon Eric R. Clark copies of Defendant's First Requests for Production of Documents to Plaintiff, along with a copy of this notice.

NOTICE OF SERVICE OF DISCOVERY, P. 1

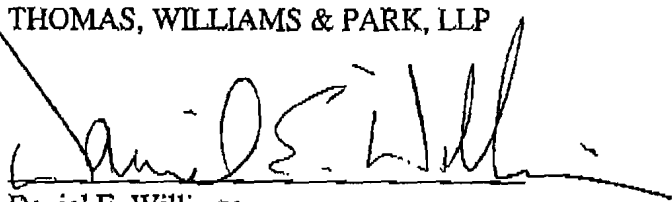
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JAN. 15. 2010 3:22PM

NO. 8027 -P. 3 - - - -

DATED this 15 day of January, 2010.

THOMAS, WILLIAMS & PARK, LLP



Daniel E. Williams  
Attorney for Defendants

JAN 22 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**REPLY TO COUNTERCLAIM  
AND  
DEMAND FOR JURY TRIAL**

Judge Williamson

BERRYHILL & COMPANY, INC. an Idaho  
Corporation,

Counterclaimant,

vs.

MOSELL EQUITIES, LLC, an Idaho Limited  
Liability Company,

Counterdefendant.

\* \* \* \* \*

The Plaintiff/Counterdefendant, by and through counsel, hereby replies to the Counterclaimant's Counterclaim as follows:

1. Unless the Counterdefendant has expressly admitted the facts or allegations stated in the Counterclaimant's Counterclaim, the Counterdefendant specifically denies each and every allegation of fact or law stated therein.

2. Regarding Counterclaim paragraphs 3, and 4, the statements are legal conclusions not requiring an affirmative response.

3. Regarding Counterclaim paragraph 2, Counterdefendant ("Mosell Equities") admits it is an Idaho Limited Liability Company and that non-party Glenn Mosell has acted as its agent. However, Mosell denies making any false representations as alleged by the Counterclaimant.

4. Regarding Counterclaim paragraph 6, Mosell Equities admits that it contacted Berryhill in 2005, but denies the remaining allegations.

5. Regarding Counterclaim paragraph 7, Mosell Equities denies that it represented to Berryhill or anyone that it "owned substantial real estate holdings in the proposed Polo Cove development." Mosell Equities is without knowledge sufficient to form a belief regarding the truth of the remaining allegation in paragraph 7.

6. Regarding Counterclaim paragraph 8, Mosell Equities denies that Berryhill provided "operational support," because there was no operating restaurant or hotel. Initially, Mosell Equities hired Berryhill and paid him \$25,000.00 as a consultant for assistance in

planning the potential restaurant and hotel. The Polo Cove project had other facets, none of which Berryhill had any involvement.

7. Regarding Counterclaim paragraph 9, as the terms “substantial time” and “operational support” are vague and ambiguous, Mosell Equities is without knowledge sufficient to form a belief regarding the truth of these allegations and therefore denies the same. Mosell Equities admits that Berryhill spent time as Berryhill indicates in Exhibits A and B working on the “resort phase” of the Polo Cove project in anticipation that Berryhill and Mosell Equities’ Company “MoBerry” would ultimately obtain ownership in the restaurant projected to be built at Polo Cove.

8. Regarding Counterclaim paragraph 10, Mosell Equities admits the allegations as stated in this paragraph with regards to Mosell Equities’ agreement to compensate Berryhill as he initially was a paid consultant for the project. Mosell Equities paid Berryhill \$25,000.00 for his services. Mosell Equities denies the allegation that it promised Berryhill compensation for the “operational support of the Polo Cove development,” because Berryhill was not involved in the overall development. Berryhill’s involvement was limited to planning of the restaurant and integration of the hotel component, or the “resort phase” as Berryhill indicates and confirms in **Exhibits A and B**, which Berryhill drafted. Mosell Equities admits that what work Berryhill performed on the “resort phase” of the Polo Cove project after he was paid as a consultant was done so to cultivate and pursue a potential opportunity for “MoBerry.”

9. Regarding Counterclaim paragraph 11, Mosell Equities admits the allegation in this paragraph that it had business cards printed, and that the cards referred to Berryhill as a “Partner.” However, the entity developing Polo Cove was a limited liability company, and

Berryhill was not a member. Furthermore, the “Partner” designation indicated Berryhill was *collaborating* in the project as the restaurateur. To the extent that Berryhill is asserting the business cards evidence his involvement as a partner in a legal partnership associated with the Polo Cove project, Mosell Equities denies such a contention because no partnership existed.

10. Regarding Counterclaim paragraph 12, as indicated by Berryhill in **Exhibit C**, moving the restaurant downtown and operating from the downtown location was separate and distinct from the Polo Cove project. Berryhill also intended to open restaurants in “Eagle, Nampa and Tamarack.” Consequently, to the extent that the Counterclaimant contends the move downtown was an “integral part of the Polo Cove development,” Mosell Equities denies such a contention.

11. Regarding Counterclaim paragraph 13, as indicated in Exhibits A , B, and C, Mosell Equities and Berryhill were contemplating Mosell Equities’ “buy in” of the restaurant. Consequently, Mosell Equities admits that both Mosell Equities and Berryhill had a vested interest in the restaurant attracting all customers, regardless of whether they invested in Polo Cove or not.

12. Regarding Counterclaim paragraph 14, Mosell Equities admits that it loaned Berryhill and his company funds for the purposes stated. However, the loan remained a loan unless Berryhill consummated the “buy in” and converted these loaned funds to a 50% equity ownership position in the restaurant, as confirmed by Berryhill in Exhibit A attached to Mosell Equities’ Amended Complaint.

13. Regarding Counterclaim paragraph 15, Mosell Equities admits that Mosell executed the guaranty. Mosell Equities also admits that the guarantee specifies the scope of the



guarantee, which indicates nothing about the Polo Cove project. Mosell Equities further admits that Mosell executed this document based on Berryhill's representation that Mosell Equities would ultimately obtain an ownership interest in the downtown restaurant, to which the lease applied.

14. Regarding Counterclaim paragraph 16, Berryhill moved his restaurant downtown because it benefited him and his restaurant. Mosell Equities denies there was any "agreement" linking the move downtown to the Polo Cove project. Mosell Equities paid an additional \$20,000.00 into the Berryhill & Company, Inc. general account above the \$405,000.00 it loaned to Berryhill and his company. Of that \$20,000.00, the information provided by Berryhill through discovery indicates that Mosell Equities was charged about \$3,500.00 for meals and drinks for friends and potential investors. Consequently, there remains approximately \$16,500.00 as a credit for Mosell Equities.

15. Regarding Counterclaim paragraphs 17, initially, in 2007, Berryhill & Company leased approximately 6,000 sq ft in the downtown location for the restaurant and kitchens, and planned to leave its catering operation and administrative offices at the former location on Broadway. However, in the latter part of 2007, Berryhill decided to move the catering operation and administrative offices to the site downtown, and needed additional room to do so. Consequently, Berryhill leased an additional 7,000 sq. feet of space near the existing restaurant that it used for ballrooms/banquet rooms, for kitchens for its catering operations, and for Berryhill & Company administrative offices. Of the approximately 13,000 sq ft Berryhill leased, he sublet approximately 1,500 sq ft. to Mosell Equities so Mosell Equities could operate a small showroom/office for the Polo Cove project. Mosell Equities therefore admits that it desired to

lease a small office in the additional space that Berryhill leased, but denies that placing an office for Polo Cove was the motivating factor for leasing the “additional space” as Berryhill appears to allege. Finally, Glenn Mosell signed a guarantee for the first lease, but he did not sign a guarantee for the additional space that Berryhill rented.

16. Mosell Equities denies Counterclaim paragraph 18.

17. Regarding Counterclaim paragraphs 19, Mosell Equities admits that it paid rent for the approximately 1,500 sq ft office it rented from Berryhill & Company. Mosell Equities denies that any written sublease existed, so the sublease was a month-to-month rental. Mosell Equities admits that it closed its office in 2008 and terminated the lease at that time. However, Mosell, who at the time believed his \$400,000 loan would be converted to 50% ownership in the restaurant, had an interest in all leased space being profitable. Although Mosell Equities no longer needed the space, Mosell suggested other uses for the sublease space, but Berryhill refused to allow a sublease.

18. Mosell Equities denies Counterclaim paragraph 20. Berryhill memorialized his understanding of the transaction in Exhibit A attached to Mosell Equities’ Amended Complaint.

19. Regarding Counterclaim paragraphs 20, 21, and 22, not only does Mosell Equities deny the allegations, these allegations are impeached by Berryhill’s own documents attached as **Exhibit A, B and C**. Berryhill understood and confirmed the loaned funds were intended to ultimately fund Mosell Equities’ “buy in” of 50% of the restaurant. Berryhill falsely represented to Mosell that the funds would remain as loans until the parties consummated the “buy in.” However, although Mosell Equities paid in the promised funds, Berryhill refused to complete the deal and transfer ownership interest (equity) in his restaurant to Mosell Equities.

20. Regarding Counterclaim paragraph 23, Mosell Equities restates and incorporates by reference its responses to the prior allegations and paragraphs as set forth fully herein.

21. Regarding Counterclaim paragraphs 24 through 32, Mosell Equities hereby denies the allegations stated therein.

22. Regarding Counterclaim paragraph 33, Mosell Equities understands that the Counterclaimant has legal counsel, but denies the Counterclaimant is entitled to costs or attorney fees under any bases.

#### **DEFENSES AND AFFIRMATIVE DEFENSES**

- A. The Counterclaimant has failed to state a claim upon which relief may be granted.
- B. The Counterclaimant's claims are barred by its own fraud and misrepresentation.
- C. The Counterclaimant's claims are barred by its own breach of contract and failure to perform.
- D. The Counterclaimant's claims are barred by waiver or estoppel.
- E. The Counterclaimant's equitable claims, if any, or equitable relief sought, if any, is barred by the Counterclaimant's unclean hands.

#### **ATTORNEY FEES**

Mosell Equities was forced to hire and retain legal counsel to protect its interests by defending against these baseless allegations and is therefore entitled to recover according to Idaho Code § 12-120(3), § 12-121, § 12-123, and the Idaho Rules of Civil Procedure, the attorney fees it has expended defending this counterclaim.

**PRAYER FOR RELIEF**

WHEREFORE, the Counterdefendant prays for judgment against the Counterclaimant as follows:

1. That the Court enter an order and judgment dismissing the Counterclaim with prejudice and awarding none of the relief claimed by the Counterclaimant;
  2. That the Court award reasonable attorney fees and costs to the Counterdefendant;
- and,
3. For such other relief as the Court deems just and appropriate.

**DEMAND FOR JURY TRIAL**

The Counterdefendant requests a jury of not less than 12 members to deliberate on all issues raised in these pleadings.

DATED this 22nd day of January 2010.

CLARK & ASSOCIATES, ATTORNEYS



---

Eric R. Clark,  
For the Counterdefendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22nd day of January, 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK

## John Berryhill

---

**Subject:** Glenn Mosell and Polo Cove  
**Start Date:** Thursday, July 14, 2005  
**Due Date:** Thursday, March 01, 2007  
**Priority:** High

**Status:** In Progress  
**Percent Complete:** 50%

**Total Work:** 0 hours  
**Actual Work:** 0 hours

**Owner:** John Berryhill

- **John Berryhill's responsibilities:**

**Berryhill & Co.** - daily duties common to running a company as it's president, owner and executive chef, weekly café specials, recipe design, cooking class research and development and teaching, working in the kitchen at times, team leader and front man for the company, tasting-choosing-writing-editing my wine and restaurant menus, continually revising gtg and catering menus, marketing and advertising including our website, plan short and long term development strategies (like gtg development in places like Eagle, Nampa, and Tamarack), working on my cookbook (which I really need to finish), etc, etc, etc.

**MBInc.** - working with Glenn, dealing with this lawsuit against Mike Matzek, focusing on the move downtown (how we will fit in the Estrella space, the # of seats that make the most sense, design and setup of two kitchens, dining, banquet room and offices, working on what happens to the current Berryhill space, working on Glenn's involvement with Berryhill and the buy in, etc.

**Polo Cove** - working with Glenn, being a front man for the resort phase, coordinating the design/architectural team on the resort phase buildings (mainly Berryhill's Restaurant and Cottages Inn), coordinating the website design and development with Tom Foerstel, developing the hospitality concept at polo cove which includes food-beverage-catering, event and concierge services, research and development design of the Berryhill's Restaurant there, designing the menu style as executive chef, etc, etc, and everything else that will potentially come my way as this starts to unfold..

- **John Berryhill's Compensation and Glenn Mosell's Berryhill Buy In:**

1) \$175 per hour consultant-designer fee

Averaged at 10 hours per week, as of February '07, would equal \$1750 per week or \$7583.33 per month.

Half - \$87.50 per hour paid in cash at \$3791.67 per month.

Half - \$87.50 per hour considered as *sweat equity value* at \$3791.67 per month, to be formally placed in polo cove investment ie: land, building or stock.

2) My time invested each week will increase the closer we get to completion on the opening of the restaurant and hotel at Polo Cove. Eventually I will receive a salary from the restaurant / hotel...or some sort of compensation, though depending on the development at the time, my consulting wage may continue or some sort of compensation, etc.

3) We will work out the details of Glenn's Berryhill & Co. buy in amounts with our attorney Kim Gourley:

a) we form MBInc, a corporation owned solely by you and I

b) I bring 49% of BCO stock to the table valued at \$387,000.00

c) you match my 49% with \$387,000.00 cash

\$187,000 to wipe out BCO debt

\$50,000 to ti's for downtown location

\$25,000 to facilitate the move and additional capital for bco

\$125,000 to me (\$50,000.00 cash payment / \$75,000.00 into the Plaza 121 Building equity)

4) I will stay an employee of BCO, and will continue to receive my salary

5) We will figure out together whatever perks we want to assign to ourselves from Berryhill (we will also need to decide how we will record them, etc).

6) Profits from BCO will be filtered through to MBInc. (we will have to decide what to do with them, ie: split up and pocket or re-invest, etc).

7) Polo Cove will continue to be billed accordingly for it's account (ie: lunch meetings etc), and will be paid to BCO by Mosell Equities, unless a change is made later.

**John Berryhill**

**Subject:** JB, Glenn Mosell-Berryhill's/MBInc/Polo Cove  
**Start Date:** Thursday, July 14, 2005  
**Due Date:** Thursday, March 01, 2007  
**Priority:** High

**Status:** In Progress  
**Percent Complete:** 50%

**Total Work:** 0 hours  
**Actual Work:** 0 hours

*Retain Revised 3/6/07*

**Owner:** John Berryhill

• **John Berryhill's responsibilities:**

**Berryhill & Co.** - daily duties common to running a company as it's president, owner and executive chef, weekly café specials, recipe design, cooking class research and development and teaching, working in the kitchen at times, team leader and front man for the company, tasting-choosing-writing-editing my wine and restaurant menus, continually revising gtg and catering menus, marketing and advertising including our website, plan short and long term development strategies (like gtg development in places like Eagle, Nampa, and Tamarack), working on my cookbook (which I really need to finish), etc, etc, etc.

**MBInc.** - working with Glenn, dealing with this lawsuit against Mike Matzek, focusing on the move downtown (how we will fit in the Estrella space, the # of seats that make the most sense, design and setup of two kitchens, dining, banquet room and offices, working on what happens to the current Berryhill space, working on Glenn's involvement with Berryhill and the buy in, etc.

**Polo Cove** - working with Glenn, being a front man for the resort phase, coordinating the design/architectural team on the resort phase buildings (mainly Berryhill's Restaurant and Cottages Inn), coordinating the website design and development with Tom Foerstel, developing the hospitality concept at polo cove which includes food-beverage-catering, event and concierge services, research and development design of the Berryhill's Restaurant there, designing the menu style as executive chef, etc, etc, and everything else that will potentially come my way as this starts to unfold..

• **John Berryhill's Compensation and Glenn Mosell's Berryhill Buy In:**

1) We will work out the details of Glenn's Berryhill & Co. buy in amounts with our attorney Kim Gourley:

a) MBInc, either a c-corp. or llc. is formed by Glenn and I, in a 50%/50% partnership

b) I bring 100% of BCO stock to the table valued at \$387,000.00

c) Glenn matches my 100% with \$387,000.00 cash

\$187,000 to wipe out BCO debt

\$50,000 to ti's for downtown location

\$25,000 to facilitate the move and additional capital for bco

Distribution tbd:

\$125,000 to me (\$50,000.00 cash payment / \$75,000.00 into the Plaza 121 Building equity)

d) I am compensated via MBInc, for additional work on MBInc and Polo Cove projects, with income (as in bonuses or tbd) and stock options etc

2) I will stay an employee of BCO, and will continue to receive my salary

3) We will figure out together whatever perks we want to assign to ourselves from Berryhill (we will also need to decide how we will record them, either through MBInc or BCO).

4) Profits from BCO will be filtered through to MBInc. (we will have to decide what to do with them, ie: split up and pocket or re-invest, and at what economic %, etc).

5) Polo Cove will continue to be billed accordingly for it's account (ie: lunch meetings, etc), and will be paid to BCO by Mosell Equities (?), unless a change is made later.

## John Berryhill

---

**Subject:** BCO Development

**Status:** Not Started  
**Percent Complete:** 0%

**Total Work:** 0 hours  
**Actual Work:** 0 hours

**Owner:** John Berryhill

This company development spans over the course of 2 years, in the order according to the following approximated timeline:

2006

1. John Berryhill and Glenn Mosell form MB Incorporated (MBI) as a 50/50 partnership.
2. MBI purchases Berryhill & Co. Incorporated (BCO).
3. Changes to the BCO model begin.

- I. John Berryhill moves out of daily operations all together.
  - He will not have an office on site.
  - He will work from home; however he will be in daily during the transition.
  - He will still perform his "face" duties on the floor.
  - An executive chef will be hired in the future, will assume John's "face" duties and work with Allen on specials.

- II. BCO General Manager: Mary Gendron
  - Key company figure over Café and Wine Bar, Special Events Catering, and Gourmet To Go Catering.
  - She will take John's old office.
  - Coordinates the efforts of the department managers.
  - Manages her own department (finance-office).
  - Answers to corporate officers of MB Inc.

- III. Company Departments:

• Finance-Office	Manager - Mary Gendron	1 full time secretary, 1 part-time asst. bookkeeper
• GTG Catering	Manager - Chip Czupka	1 part-time employee (filling in for Chip)
• Special Events Catering	Manager - Mark Henderson	1 part-time in office/bar boy + 5-10 part-time caterers
• Café and Wine Bar	Co-Managers - Robert Parker Harmony Anderson and Tracey Meyer	6-7 part-time servers and hosts etc.
• Kitchen	Co-Managers - Allen Barrett Bryan Fulkerson	5 full time line cooks (2 am, 3 pm), 1 part-time cook, 2 dishroom, 1 part-time delivery driver

4. BCO focuses on changes to departmental models.

- I. Special Events Catering
  - Design and coordination, wedding consulting, party planning etc., become a separate charged entity.
  - We will offer our catering and staffing services to individual party planners who will then refer and hire us.
  - (we handle the full service food, staffing if needed, ordering of rentals if needed and insurances)

- II. GTG Catering
  - Begin to re-structure this division with a larger menu offering for delivery still, but also with an onsite counter with deli cases etc. filled with pre-made salads, sandwiches and desserts where individuals can order and pickup.

5. MBI purchases the Broadway Park strip mall then beautifies the exterior and boosts the "all under market value" rents and leases.



2007

6. MBI finds and develops a downtown parcel for the BCO Café and Wine Bar, with loft condos above.
7. BCO re-defines it's space at Broadway Park to the original, plus a little extra for offices.
  - I. The Café and Wine Bar with banquet facilities would move downtown (this will happen obviously in conjunction with the downtown development's timeline).
  - II. The Special Events Catering and GTG would stay.
  - III. The general and catering offices would stay.
  - IV. GTG would have a storefront, and the new model would begin.
8. MBI publishes John Berryhill's first cookbook.
9. MBI either finds and develops land or just leases a space in Eagle for another BCO GTG location .

2008

10. Another MBI company, Polo Cove Resort Services (PCRS), opens John Berryhill's restaurant in the 1st phase of it's Polo Cove Resort.
11. MBI will sell Broadway Park.
12. MBI will find and develop land or just leases a space in Donnelly for another BCO GTG location.
13. MBI will continue it's development projects with other BCO GTG locations, PCRS restaurants, hotel, club and spa.

TIME RECEIVED  
March 1, 2010 2:13:00 PM MST

REMOTE CSID  
208 939-7136

DURATION  
84

PAGES  
2

STATUS  
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Sent by: CLARK & ASSOCIATES, ATTORNEYS

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Page 1 of 2

**ORIGINAL**

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MAR 01 2010

**J. DAVID NAVARRO, Clerk**  
By KATHY J. BIEHL  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF DEPOSITION:  
VICTORIA MEIER

Judge Williamson

TO: VICTORIA MEIER

PLEASE TAKE NOTICE that counsel for Plaintiff Mosell Equities, LLC, will take the  
testimony upon oral examination of Victoria Meier pursuant to the Idaho Rules of Civil  
Procedure, before an officer authorized to administer oaths on **Tuesday, March 16, 2010, at**  
**9:00 a.m.** at the Ada County Courthouse, 200 West Front St, Boise, Idaho.

NOTICE OF DEPOSITION: VICTORIA MEIER - 1

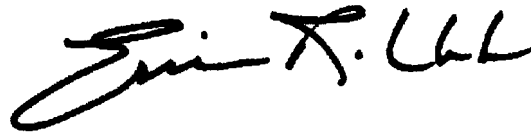
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The deposition will be for all purposes authorized under the Idaho Rules of Civil Procedure.

Dated this 1st day of March 2010.

CLARK & ASSOCIATES, ATTORNEYS



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Eric R. Clark  
For the Plaintiff

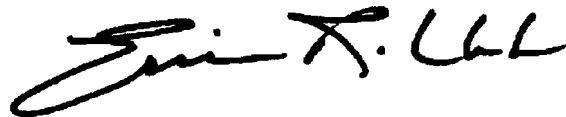
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1st day of March, 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS &  
PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701

Victoria Meier  
EBERLE, BERLIN, KADING, TURNBOW  
& McKLVEEN, CHTD.  
1111 W. Jefferson St., Ste. 530  
P.O. Box 1368  
Boise, ID 83701

Burnham Habel & Associates  
Inc.  
6027 W. Clinton St  
Boise, ID 83704-9306



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ERIC R. CLARK

MAR. 11. 2010 12:57PM

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A.M. \_\_\_\_\_ P.M. 1:20

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

MAR 11 2010

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

Attorneys for Defendants

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,  
Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**RULE 30(b)(6) NOTICE  
DUCES TECUM OF  
TAKING DEPOSITION**

PLEASE TAKE NOTICE That the above-named Defendants, will take the testimony of  
the custodian of records for the Bank of Cascades, Boise, Idaho, by deposition upon oral  
examination pursuant to Rule 30(b)(6) of the Idaho Rules of Civil Procedure. Rule 30(b)(6)  
IRCP, requires the party to designate one or more officers, directors, or managing agents, or other  
RULE 30(b)(6) NOTICE DUCES TECUM OF TAKING DEPOSITION, P. 1

000295

persons to testify on its behalf, and said person or persons are to be familiar with and able to testify in full compliance with this rule, with regard to the specific matters identified below and the documents identified below for production. The deposition(s) may be recorded by sound-and-visual or stenographic means.

The examination will take place before a notary public and court reporter, on the 10th day of April, 2010, beginning at the hour of 9:00 a.m., and continuing thereafter until completed at the offices of Thomas, Williams & Park, LLP, 121 N. 9<sup>th</sup> St., Suite 300, Boise, Idaho 83702.

YOU ARE FURTHER NOTIFIED that said deponent will be required to testify regarding the maintenance of business records of the type described below.

YOU ARE FURTHER NOTIFIED that said deponent will be required to bring and produce the following documents and/or tangible things:

Any and all "documents," as defined below, which were submitted by Glenn Eric Mosell of Eagle, Idaho, between 2006 and 2008 in support of any loan application on behalf of himself or any limited liability company, including but not limited to Mosell Equities, L.L.C., Polo Cove Development Company, LLC, Polo Cove Land Company LLC, Sunnyslope Brewing Company LLC, Sunnyslope Development Company, LLC, Sunnyslope Food and Wine Company LLC, Sunnyslope Land Company, LLC, Sunnyslope Venture Fund I, LLC, Sunnyslope Ventures LLC, and/or Sunnyslope Wine Company, LLC, which documents should include any loan applications, financial statements and any other documents setting forth any information provided by Glenn Eric Mosell.

#### DEFINITIONS

Unless otherwise indicated, the following definitions will be applicable to these

Interrogatories and/or Requests:

(a) "Person" shall mean and include a natural person, partnership, firm or corporation or any other kind of business or legal entity, its agents or employees. In each

instance wherein you are asked to "identify" a person or the "identity" of a person, state with respect to each such person his name and last known residence, business address and telephone number.

(b) The words "document" and "documents" mean all written, recorded or graphic matters, however produced or reproduced, pertaining in any way to the subject matter of this action. This definition includes, but is not limited to, any and all originals, non-identical copies or drafts, whether produced manually or by mechanical, electrical, electronic, other artificial process or a combination of these methods, of any and all of the following: correspondence, memoranda, notes, diaries, desk calendars and organizers, statistics, letters, telegrams, minutes, contracts, agreements, reports, studies, checks, statements, receipts, return summaries, pamphlets, books, prospectuses, interoffice and intraoffice communications, e-mail messages, offers, notation of any sort of conversations, telephone calls, meeting or other communications, telephone logs, bulletins, printed matter, computer printouts, teletypes, telefax, invoices, work sheets and all drafts, alterations, modifications, changes and amendments of any of the foregoing, any graphic or aural records or representations of any kind [including, without limitations, tapes, cassettes, disks, hard drives or records of hard drives, recordings], or other graphic, symbolic, recorded or written materials of any nature whatsoever, whether in your possession, custody or control or in the possession, custody or control of your agents, attorneys, accountants, employees or any other representatives. Any document which contains any comments, notations, addition, insertion or marking of any kind which is not part of another document is to be considered as a separate document.

In each instance wherein you are asked to "identify" or describe a document, your description should include but not be limited to the following:

(1) The name, address, telephone number, occupation, job title and employer of the present custodian of the document;

(2) The date of the making of the document and the name, address, telephone number, occupation, job title and employer of each person whose testimony could be used to authenticate such document and lay the foundation for its introduction into evidence.

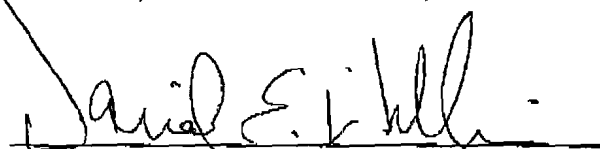
(c) "You" or "yours" shall refer to the records custodian and/or representatives, agents, or other persons acting on behalf of Bank of The Cascades or the deponent.

(d) "Knowledge" includes first-hand knowledge and information derived from any other source, including but not limited to hearsay knowledge.

(e) "Statement" shall refer to a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

DATED this 10 day of March, 2010.

THOMAS, WILLIAMS & PARK, LLP



Daniel E. Williams

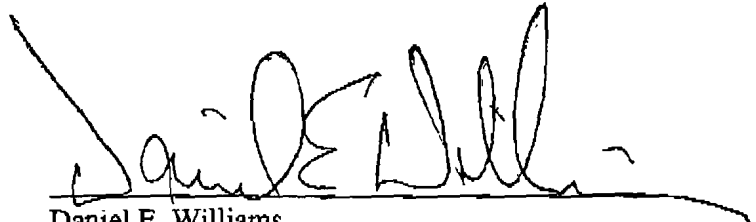
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of March, 2010, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☐ Via Facsimile: 939-7136  
☒ Via U.S. Mail

  
Daniel E. Williams



NO. \_\_\_\_\_  
AM. \_\_\_\_\_ FILED P.M. 4:36  
MAR 12 2010  
J. DAVID NAVARRO, Clerk  
By REGGIE TOWNLEY  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697  
E-mail: eclark@Clark-Attorneys.com

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

MOSELL EQUITIES' MOTION TO  
QUASH DEFENDANTS'  
"RULE 30(B)(6), NOTICE OF DUCES  
TECUM OF TAKING DEPOSITION"  
(TO "BANK OF CASCADES")

COMES NOW the Plaintiff and by and through its counsel of record hereby requests the  
Court enter an Order according to Rule 45(d). IRCP quashing the Defendants' Subpoena as it is  
unreasonable, oppressive and subjects persons and entities not parties to this litigation to  
disclosure of personal and private financial information.

ARGUMENT

This is a *unique* fraud case. Berryhill promised that if Mosell Equities, LLC loaned him  
\$400,000.00 or more Berryhill would transfer that loan to ownership interest in his restaurant.

MOSELL EQUITIES' MOTION TO QUASH DEFENDANTS' "RULE 30(B)(6), NOTICE OF DUCES  
TECUM OF TAKING DEPOSITION" (TO "BANK OF CASCADES") - 1

000300

However, although Mosell Equities, LLC loaned this money to Berryhill, Berryhill ultimately refused to sign the ownership purchase documents he had is own attorney prepare. Berryhill kept the \$405,000.00, still operates the restaurant, and now has counter-sued Mosell Equities for fraud? As noted above, this is a unique fraud case, as one party claiming to be defrauded ended up with all the money.

On March 10, 2010, the Defendants served a "Rule 30(b)(6), Notice of Duces Tecum Taking Deposition" in which the Defendants indicated they were demanding that "Bank of Cascades, Boise, Idaho," produce records from persons or entities, all of which other than Mosell Equities, LLC, are not parties to this litigation.

YOU ARE FURTHER NOTIFIED that said deponent will be required to bring and produce the following documents and/or tangible things:

Any and all "documents," as defined below, which were submitted by **Glenn Eric Mosell** of Eagle, Idaho, between 2006 and 2008 in support of any loan application on behalf of himself or any limited liability company, including but not limited to Mosell Equities, L.L.C., **Polo Cove Development Company, LLC, Polo Cove Land Company LLC, Sunnyslope Brewing Company LLC, Sunnyslope Development Company, LLC, Sunnyslope Food and Wine Company LLC, Sunnyslope Land Company, LLC, Sunnyslope Venture Fund I, LLC, Sunnyslope Ventures LLC, and/or Sunnyslope Wine Company, LLC**, which documents should include any loan applications, financial statements and any other documents setting forth any information provided by Glenn Eric Mosell. (Emphasis added)

The Defendants scheduled the deposition for Saturday, April 10<sup>th</sup>, 2010.

Motion to Quash. First, as Glenn Eric Mosell, Polo Cove Development Company, LLC, Polo Cove Land Company LLC, Sunnyslope Brewing Company LLC, Sunnyslope Development Company, LLC, Sunnyslope Food and Wine Company LLC, Sunnyslope Land Company, LLC, Sunnyslope Venture Fund I, LLC, Sunnyslope Ventures LLC, and/or Sunnyslope Wine Company, LLC, are not parties to this action, the Defendants have no legal or factual basis to demand production of private legal and financial documents that pertain to Mr. Mosell or these

MOSELL EQUITIES' MOTION TO QUASH DEFENDANTS' "RULE 30(B)(6), NOTICE OF DUCES TECUM OF TAKING DEPOSITION" (TO "BANK OF CASCADES") - 2

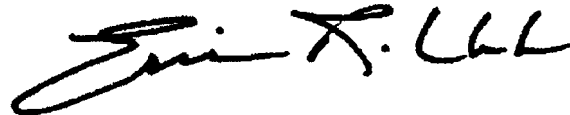
entities. Consequently, regarding these non-parties, the Defendant's Deposition Duces Tecum is patently *unreasonable*, and must be quashed.

Second, under the circumstances of this case, it is hard to imagine just what relevance the information requested has as applied to the only named party - Mosell Equities, LLC. How is Mosell Equities' financial information in 2006—2008 relevant when Mosell Equities loaned money to Berryhill? Berryhill got the money, he did not loan any money, so he could not have relied on any financial information that was in any way related to Mosell Equities.

The information requested is private financial information that appears to be irrelevant to any claim or defense raised by these Defendants. Unless the Defendants can present to the Court compelling reasons that it is entitled to this information in support of any claim or defense, the Court must quash this subpoena.

RESPECTFULLY SUBMITTED this 12th day of March, 2010.

CLARK & ASSOCIATES, ATTORNEYS



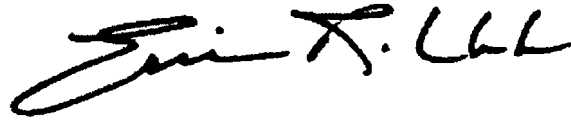
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Eric R. Clark

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12th day of March, 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



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ERIC R. CLARK

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Page 1 of 6

**ORIGINAL**

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 A.M. \_\_\_\_\_  
 FILED P.M. 4:36  
**MAR 12 2010**  
 J. DAVID NAVARRO, Clerk  
 By REGGIE TOWNLEY  
 DEPUTY

ERIC R. CLARK, Esq.  
 CLARK & ASSOCIATES, ATTORNEYS  
 P.O. Box 2504  
 Eagle, Id 83616  
 Office: 208-830-8084  
 Fax: 208-939-7136  
 Idaho State Bar No. 4697  
 E-mail: eclark@Clark-Attorneys.com

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
 IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
 Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
 Corporation, JOHN E. BERRYHILL III and  
 AMY BERRYHILL, individually, and as  
 husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF HEARING RE:  
 MOSELL EQUITIES' MOTION TO  
 QUASH DEFENDANTS'  
 "RULE 30(B)(6), NOTICE OF DUCES  
 TECUM OF TAKING DEPOSITION"  
 (TO "BANK OF CASCADES")

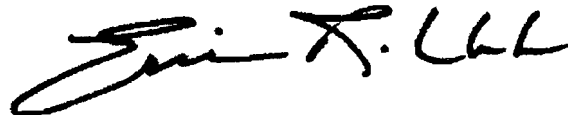
TO: ABOVE NAMED DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, April 7, 2010, at 2:45 p.m., or as soon  
 thereafter as counsel can be heard, Plaintiff will call up for hearing MOSELL EQUITIES'  
 MOTION TO QUASH DEFENDANTS' "RULE 30(B)(6), NOTICE OF DUCES TECUM OF  
 TAKING DEPOSITION"(TO "BANK OF CASCADES") before the Honorable Darla  
 NOTICE OF HEARING RE: MOSELL EQUITIES' MOTION TO QUASH DEFENDANTS' "RULE 30(B)(6),  
 NOTICE OF DUCES TECUM OF TAKING DEPOSITION" (TO "BANK OF CASCADES") - 1

Williamson, District Judge, at the Ada County Courthouse, Boise, Idaho.

RESPECTFULLY SUBMITTED this 12th day of March, 2010.

CLARK & ASSOCIATES, ATTORNEYS



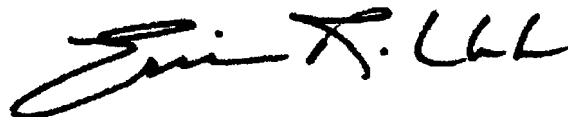
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Eric R. Clark

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12th day of March, 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



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**MAR 16 2010**

**J. DAVID NAVARRO, Clerk**  
By **REGGIE TOWNLEY**  
DEPUTY

*[Faint circular stamp]*

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**NOTICE OF DEPOSITION:**  
**JOHN E. BERRYHILL III**  
Judge Williamson

TO: JOHN E. BERRYHILL III, and his Counsel of Record.

PLEASE TAKE NOTICE that counsel for Plaintiff Mosell Equities, LLC, will take the testimony upon oral examination of John H. Berryhill, III pursuant to the Idaho Rules of Civil Procedure, before an officer authorized to administer oaths on **Tuesday, April 6, 2010, at 9:00 a.m.** at the Ada County Courthouse, 200 West Front St, Boise, Idaho.

NOTICE OF DEPOSITION: JOHN E. BERRYHILL III - 1

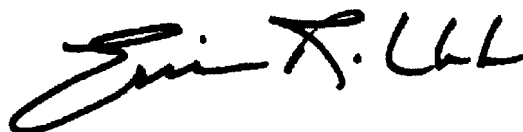
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*[Handwritten mark]*

The deposition will be for all purposes authorized under the Idaho Rules of Civil Procedure.

Dated this 16<sup>th</sup> day of March 2010.

CLARK & ASSOCIATES, ATTORNEYS



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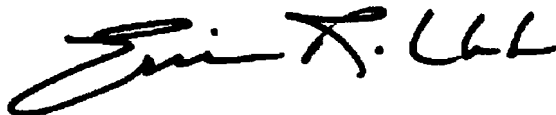
Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16th day of March, 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS &  
PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701

Burnham Habel & Associates  
Inc.  
6027 W. Clinton St  
Boise, ID 83704-9306



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ERIC R. CLARK



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Page 1 of 2

NO. 77 FILED PM  
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MAR 17 2010

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF SERVICE OF  
PLAINTIFF'S THIRD SET OF  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS TO DEFENDANTS

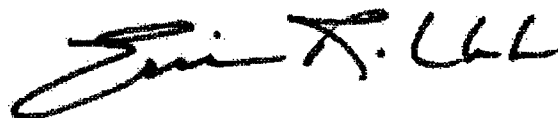
PLEASE TAKE NOTICE the Plaintiff has forwarded a true and correct copy of  
PLAINTIFF'S THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS  
TO DEFENDANTS as provided by Rule 34 of the Idaho Rules of Civil Procedure on this  
date to the Defendants via facsimile transmission to the Defendants' attorney of record.

NOTICE OF SERVICE OF PLAINTIFF'S THIRD SET OF REQUESTS FOR PRODUCTION  
OF DOCUMENTS TO DEFENDANTS - 1

000308

DATED this 17th day of March, 2010.

CLARK & ASSOCIATES, ATTORNEYS

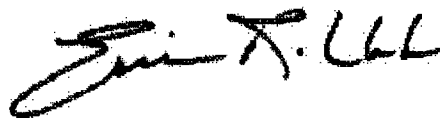


Eric R. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17<sup>th</sup> day of March, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



ERIC R. CLARK

J. DAVID NAVARRO, Clerk  
By P. BOURNE  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Judge Williamson

\*\*\*\*\*

COMES NOW the Plaintiff Mosell Equities, LLC and according to Rules 56(a) and (c),  
IRCP, and hereby moves for summary judgment on Counts 1 of its *Amended Complaint and  
Demand for Jury Trial*. The Plaintiff is entitled to summary judgment on this count as there is  
no genuine issue of material fact that precludes summary judgment.

The Plaintiff has filed a memorandum and the Affidavits of Glenn Mosell, with exhibits,  
including a written contract, in support of this Motion.

The Plaintiff hereby requests oral argument.

DATED this 22nd day of March, 2010.

CLARK & ASSOCIATES, ATTORNEYS



---

Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22<sup>nd</sup> day of March, 2010, I served the foregoing, by having a true and complete copy delivered via hand delivery to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK

MAR 22 2010

J. DAVID NAVARRO, Clerk  
By P. BOURNE  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**PLAINTIFF'S MEMORANDUM  
FILED IN SUPPORT OF MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

Judge Williamson

\*\*\*\*\*

COMES NOW the Plaintiff and hereby provides its Memorandum in Support of its

Motion for Partial Summary Judgment.

**STATEMENT OF FACTS**

In 2005, John Mosell and Glenn Mosell contemplated a business relationship by forming a company called MB Incorporated as a "50/50 partnership." (Affidavit of Glenn Mosell, Exhibit 2.) MB Incorporated would purchase Berryhill & Company, Inc., the entity that operated Berryhill & Co. Restaurant. (*Id.*) John Berryhill owned Berryhill & Company, Inc., and was its sole shareholder.

PLAINTIFF'S MEMORANDUM FILED IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY  
JUDGMENT- 1

000312

As early as 2005, Berryhill desired to relocate his restaurant from Broadway to downtown Boise. (Affidavit of Glenn Mosell, Exhibit 2.)

At that time, Glenn Mosell, through various business entities, was developing a wine country resort hotel, restaurant and equestrian center in the Sunnyslope area of Canyon County, Idaho. Mosell was collaborating with Paul Beckman and Foad Roghani on the land acquisition and entitlement of what they called Polo Cove. (Affidavit of Glenn Mosell, para. 3, Exhibit 1.)

Mosell contacted Berryhill about investing in Polo Cove, but Berryhill did not have the financial resources to invest. Mosell then hired Berryhill as a consultant to the project and paid Berryhill \$25,000.00 in consulting fees from 2005 to March 2007. (Affidavit of Glenn Mosell, paras. 4 – 5, and 21.)

Berryhill and Mosell continued discussions about forming a business relationship that owned Berryhill's restaurant, and in March 2007, Berryhill submitted 3 written proposals. (Affidavit of Glenn Mosell, Exhibits 3, 4, and 5.)

After working out the details, Mosell and Berryhill hired attorney Kim Gourley to draft documents creating an entity called "MoBerry." (Affidavit of Glenn Mosell, paras. 21, 22, and 23, and Exhibit 6.)

Although contacting Gourley in February or March 2007, Mosell and Berryhill did not finalize their business relationship in 2007.

In the spring of 2007, the Plaza 121 restaurant space in downtown Boise became available for lease. However, Berryhill did not have the funds to pay for the move. Because Mosell and Berryhill had not yet reached an agreement at that time regarding the terms of Mosell's buy in of the restaurant, Mosell agreed that Mosell Equities, LLC would provide a loan to fund Berryhill's relocating the restaurant downtown, which Berryhill had contemplated since 2005, and that those loaned funds may ultimately fund Mosell's buy in. (Affidavit of Glenn Mosell, para. 26, and Exhibit 2.)

On June 28, 2007 Glenn Mosell signed a Mosell Equities, LLC check made payable to "Berryhill & CO" for \$50,000.00. In the "memo" section of the check, Mr. Mosell wrote "loan." Mr. Mosell provided the check to John Berryhill. (Affidavit of Glenn Mosell, Exhibit 12.)

Mosell and Berryhill then copied that check and Berryhill wrote on the page below the check that the money was a loan from Mosell Equities to Berryhill & CO, that the money would be deposited in the "general check register," and would be "used for any building payables needed for downtown or Berryhill & Co." Finally, Berryhill indicated, "It [the loan] will be transitioned into part of Glenn's 'buy in' of MoBerry Venture Corp. Inc." Both Mosell and Berryhill signed the document. (Affidavit of Glenn Mosell, Exhibit 7.)

Thereafter, on July 30, 2007 Glenn Mosell signed a Mosell Equities, LLC check made payable to "Berryhill & CO" for \$25,000.00. In the "memo" section of the check, Mr. Mosell wrote "loan." (Affidavit of Glenn Mosell, Exhibit 12.)

On August 9, 2007 Glenn Mosell signed a Mosell Equities, LLC check made payable to "Berryhill & CO" for \$25,000.00. In the "memo" section of the check, Mr. Mosell wrote "loan – TT's." (Affidavit of Glenn Mosell, Exhibit 12.)

On August 16, 2007 Glenn Mosell signed a Mosell Equities, LLC check made payable to "Berryhill & CO" for \$25,000.00. In the "memo" section of the check, Mr. Mosell wrote "loan #4." (Affidavit of Glenn Mosell, Exhibit 12.)

On August 16, 2007 Glenn Mosell signed a Mosell Equities, LLC check made payable to "Berryhill & Company" for \$25,000.00. In the "memo" section of the check, Mr. Mosell wrote "loan #5." (Affidavit of Glenn Mosell, Exhibit 12.)

On October 9, 2007 Glenn Mosell signed a Mosell Equities, LLC check made payable to "Berryhill & CO" for \$60,000.00. In the "memo" section of the check, Mr. Mosell wrote "Kitchen Equip. loan."

On October 26, 2007 Glenn Mosell signed a Mosell Equities, LLC check made payable to "Berryhill & Company" for \$100,000.00. In the "memo" section of the check, Mr. Mosell wrote "loan." (Affidavit of Glenn Mosell, Exhibit 12.)

On December 4, 2007 Glenn Mosell signed a Mosell Equities, LLC check made payable to "Berryhill & Company" for \$25,000.00. In the "memo" section of the check, Mr. Mosell wrote "loan." (Affidavit of Glenn Mosell, Exhibit 12.)

On December 19, 2007 Glenn Mosell signed a Mosell Equities, LLC check made payable to "Berryhill & Company" for \$50,000.00. In the "memo" section of the check, Mr. Mosell wrote "loan." (Affidavit of Glenn Mosell, Exhibit 12.)

Between June 28, 2007 and April 30, 2008 Mosell Equities, LLC made a loan, in installments, to Berryhill and his company totaling \$405,000.00. (Affidavit of Glenn Mosell, Exhibit 12.)

Berryhill deposited each of these checks in the general account for Berryhill & Company, Inc. and had his General Manager account for the loan on the books as a long-term liability. (Affidavit of Glenn Mosell, Exhibit 11, Joy Luedtke's Depo. Tr., p. 27, and Luedtke Depo. Exhibit 1.)

Berryhill took \$50,000.00 of those loaned funds for his own use. (Affidavit of Glenn Mosell, Exhibit 11, Joy Luedtke's Depo. Tr., p. 27, and Luedtke Depo. Exhibit 1.)

Joy Luedtke, Berryhill's General Manager, who was responsible for the company bookkeeping and interacted with Berryhill on almost a daily basis regarding the company's finances, testified that the Mosell "buy in" to the restaurant and the Polo Cove project were separate. She testified that *if* the loaned funds had been an "investment in Polo Cove," as Berryhill now contends, then she would have created a different checking account.

9 Q. (BY MR. CLARK) Okay. There's been a contention  
10 that the relevant funds constituted an investment by  
11 Mosell Equities, LLC, in a speculative venture dealing  
12 with the proposed development of Polo Cove near Sunny  
13 Slope in Canyon County, Idaho.

14 And from a pure accounting standpoint, did  
15 Berryhill & Company as you know from the time you worked  
16 there ever account for these funds as an investment?

17 MR. WILLIAMS: Object to the form.  
18 Foundation.

19 THE WITNESS: No. It did not.

20 My impression would be that if it was going to  
21 be an investment in Polo Cove, that it should have been a  
22 different checking account.

(Affidavit of Glenn Mosell, Exhibit 11, Joy Luedtke's Depo. Tr.. p. 54.)

When Mosell made the first installment of the loan, it was his and Berryhill's intent that the Mosell Equities' loans would ultimately be converted to a 50% equity ownership of Berryhill & Company, Inc., or some other entity that owned Berryhill's restaurant, and they memorialized that intent in writing. (Affidavit of Glenn Mosell, para. 31, and Mosell Aff. Exhibit 7.)

Joy Luedtke, Berryhill & Company's General Manager also testified that Berryhill told her the loaned funds were part of the buy in for the restaurant.

6 Q. (BY MR. CLARK) What do you know about -- I  
7 think you mentioned the term buy-in. What do you know  
8 about a buy-in by Mosell Equities or Mr. Mosell at the  
9 Berryhill & Company Restaurant or business?

10 MR. WILLIAMS: Object to the form.

11 THE WITNESS: Um, what John told me was that  
12 there was money that Glenn was giving him personally, as  
13 well as money that was specifically for the restaurant,  
14 and that both of those together were part of the buy-in,  
15 but I don't remember what the amounts were supposed to  
16 be.

17 Q. (BY MR. CLARK) Do you understand that the  
18 285,000, or whatever that is, accounted --

19 A. \$385,000.

20 Q. The 385. Excuse me.

21 That was buy-in money?

22 A. It wasn't all of it, but he was making  
23 payments.

24 Q. Okay.



25 Do you ever know what the buy-in amount was?

38

- 1 A. He told me. I know it was over \$400,000, but I
- 2 don't remember exactly how much it was.

(Affidavit of Glenn Mosell, para. 34; Exhibit 11, (Luedtke's Deposition), p. 37-38.)

At the end of 2007, Joy Luedtke was concerned because while she understood that Mosell and Berryhill contemplated forming a business relationship, she was faced with accounting for the Mosell loans for tax purposes. After a meeting with the accountant, Mosell and Berryhill agreed that that loans would remain on the books as a long-term liability for Berryhill & Company, Inc. and the parties would formalize their business relationship in 2008. (Affidavit of Glenn Mosell, para. 34; Exhibit 11, (Luedtke's Deposition), p. 39-40.)

In early 2008, Mosell and Berryhill met with attorney Victoria Meier who after receiving information from Mosell and Berryhill drafted various legal documents that created additional stock in Berryhill & Company, Inc., for Glenn Mosell to purchase those additional shares with the money loaned to Berryhill & Company, Inc. – the transition to the buy in. (Affidavit of Glenn Mosell, para. 37, 38, and 39, and Mosell Aff. Exhibit 8).

In September 2008, Mosell approached Berryhill and stated they either needed to sign the documents Victoria Meier drafted thereby consummating the anticipated buy in, or Berryhill needed to repay the loan. (Affidavit of Glenn Mosell, paras. 51 and 52.)

Berryhill did not respond, so Mosell had his attorney contact Berryhill and demand repayment. (Affidavit of Glenn Mosell, para. 53, Mosell Aff. Exhibit 9.)

Berryhill responded through Mr. Williams that the loaned funds were not really a loan, but an "investment" by Mosell Equities in Polo Cove. (Affidavit of Glenn Mosell, para. 53, Mosell Aff. Exhibit 10.)

When Mosell requested his money back, Berryhill had discussions with Joy Luedtke about the availability of funds to repay the loans. However, Ms. Luedtke did not testify that Berryhill told her that Berryhill & Company did not need to repay Mosell because the loaned funds were not really loans. (Affidavit of Glenn Mosell, para. 34; Exhibit 11, (Luedtke's Deposition), p. 62-64.)

Page 62

- 3 Q. Were you aware of any request or conversation by
- 4 Mr. Mosell with Mr. Berryhill about confirming the
- 5 partnership or Mr. Mosell withdrawing his position from
- 6 or requesting his money back or anything along those
- 7 lines?
- 8 MR. WILLIAMS: Object to the form
- 9 THE WITNESS: I remember around September of '08
- 10 their relationship began to dissolve.

11 John had said that they had gotten together and  
12 that Glenn had said he could no longer be as invested in  
13 Berryhill & Company as he had been up to that point and  
14 that he requested to receive some of his moneys back,  
15 that he could be a partial investor, but not as heavily  
16 invested as he was anymore.

17 And John said he asked him, that Glenn asked  
18 John to try to find other people to invest so that he  
19 could get some of his money back out of the company.

20 Q. (BY MR. CLARK) You had a conversation with  
21 Mr. Berryhill about that?

22 A. Yes. John told me that that had happened.

23 Q. Okay. And what was Mr. Berryhill's response?

24 A. Concern. I know that he was thinking about it a  
25 lot.

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1 He didn't go into his response with me, only  
2 that it had happened.

3 I could tell he was still processing it.

4 You know, something we were both mutually aware  
5 of is that the economy had just really gone south, and so  
6 to find an investor seemed like a really big task at that  
7 time.

8 And so to give money back at at that point would  
9 have put the restaurant in a very vulnerable situation.

10 Q. Did Mr. Berryhill ask you if there were funds  
11 available to pay Mr. Mosell back?

12 A. No.

13 Q. Did you indicate that? Were there any  
14 discussions between you and Mr. Berryhill regarding the  
15 ability to pay Mr. Mosell back?

16 A. We talked about what was left in the line of  
17 credit with Bank of the Cascades, and we looked at what  
18 we had from a credit standpoint.

19 And I think we still had the Key Bank line of  
20 credit that was open. And this had been paid off in  
21 full.

22 And so there were places that we could pull from  
23 those lines of credit in order to pay Glenn, but those,  
24 we also recognized that we needed those lines of credit  
25 as a revolving account, because sometimes you have to

64

1 pull from that to pay for staff.

2 And, you know, the restaurant business is very

- 3 seasonal. So to max out those lines of credit would have
- 4 compromised his company.

The anticipated buy in never occurred and to date Berryhill or his company had not paid any of the \$405,000.00 loan back to Mosell Equities. (Affidavit of Glenn Mosell, para. 54 and 59.)

### STANDARD OF REVIEW

Recently, in *Chandler v. Hayden*, \_\_\_ Idaho \_\_\_ 215 P.3d 485 (2009), the Idaho Supreme Court reiterated that standard applicable when a district court is considering summary judgment.

When ruling on a motion for summary judgment, the trial court must determine whether the evidence, when construed in the light most favorable to the nonmoving party, resents a genuine issue of material fact or shows that the moving party is not entitled to judgment as a matter of law. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007) (citing *Pincock v. Pocatello Gold & Copper Mining Co.*, 100 Idaho 325, 328, 597 P.2d 211, 214 (1979)). The moving party bears the burden of proving the absence of material facts. *Id.* (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). **Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. *Id.* A nonmoving party must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact. *Id.* (citing *Zehm v. Assoc. Logging Contractors, Inc.*, 116 Idaho 349, 350, 775 P.2d 1191, 1192 (1988))**

The *Chandler* Court also established the requirement for the nonmoving party, if raising an affirmative defense, to respond with “sufficient facts” establishing a genuine issue of material fact exists to support each element of that defense.

Requiring a nonmoving defendant to present evidence in support of an affirmative defense in opposition to a motion for summary judgment is also consistent with the language of I.R.C.P. 56(e), which provides: “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Based on the foregoing, **we conclude that a nonmoving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment.** (Emphasis added)

## ARGUMENT

### **MOSELL EQUITIES IS ENTITLED TO SUMMARY JUDGMENT ON COUNT 1 OF ITS AMENDED COMPLAINT.**

The parties had a written agreement.

IDJI 6.01.1 – Elements of contract - introductory

A contract is an agreement between two or more parties to do or not do something that is supported by consideration.

There are four elements to complete a contract. Every contract must have these four elements. The four elements are:

1. Competent parties;
2. A lawful purpose;
3. Valid consideration; and
4. Mutual agreement by all parties to all essential terms.<sup>1</sup>

Very simply, it is undisputed that Berryhill drafted a contract in his own handwriting in which Berryhill acknowledges the \$50,000.00 he received from Mosell Equities was a loan, that those funds would be used within Berryhill's company to pay company expenses, and that the funds will be "transitioned" into part of Glenn Mosell's "buy in" of the company Berryhill and Mosell envisioned they would own. (Affidavit of Glenn Mosell, Exhibit 7. (Amended Complaint, Exhibit 1))

The parties subsequently amended their written agreement nine times.

IDJI 6.09.1 – Amendments to contracts

A contract may be amended or modified by an agreement of the parties.

This requires all of the elements of any other contract.

Mosell contends that the parties agreed to amend the original written contract each time Mosell equities wrote and Berryhill accepted a subsequent loan check. It is undisputed that Mosell Equities made nine more loan installments to Berryhill & Company, Inc. over the course

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<sup>1</sup> The parties did not state repayment terms or an interest rate for the loan, but the Court can supply the statutory interest rate in Idaho Code § 28-22-104, and a reasonable time for repayment according to IDJI 6.14.1 - Time for performance of a contract.

of several months, which Berryhill used for the exact same purposes he indicated was his intent in this written contract.

Additionally, it is undisputed that Berryhill directed his General Manager to account for the first installment and each subsequent installment as long-term liabilities in the “Mosell Equities’ Long-Term Liability Account.” In other words, Berryhill’s accounting records confirm his company considered each loan installment as part of a “universal” loan from Mosell Equities, LLC.

It is also undisputed that in early 2008, well after Berryhill received most of the loan installments, Berryhill had his attorney draft corporate documents in which he acknowledged that the \$405,000.00 Mosell Equities had loaned was in fact a loan to Berryhill & Company, subject to transitioning into Mosell’s buy in.

Finally, it is undisputed that Berryhill refused to sign the “buy in” documents and refused to repay Mosell Equities’ loan.

At trial, it is Mosell Equities burden of production of proof of the following elements:

- IDJI 6.10.1 – Breach of bilateral contract – general case – no affirmative defenses  
The plaintiff has the burden of proving each of the following propositions:
1. A contract existed between plaintiff and defendant;
  2. The defendant breached the contract;
  3. The plaintiff has been damaged on account of the breach; and
  4. The amount of the damages.

There is no genuine issue of material fact that the parties contracted, that Berryhill & Company failed to repay the loan or to consummate the buy in, that Mosell Equities has been damages due to the breach, and that Berryhill & Company, Inc. owes Mosell Equities \$405,000.00 plus accumulating interest. Consequently, Mosell Equities is entitled to summary judgment on Count 1 of its Amended Complaint.

## CONCLUSION

Mosell Equities very respectfully requests that this Court consider the facts presented and find and rule as follows:

1. That Mosell Equities agreed to and did loan Berryhill & Company, Inc., in installments, a total of \$405,000.00, beginning on June 28, 2007, and ending with the last loan installment on April 30, 2008.
2. That Berryhill & Company, Inc.'s duty to repay the loan was contingent upon the parties subsequently agreeing to apply the loaned funds as funds for Glenn Mosell or Mosell Equities' buy in of Berryhill & Company, Inc., or other entity to be owned by the parties.
3. That the parties never completed any anticipated buy in, so the loaned funds remained as an outstanding loan to Berryhill & Company, Inc.
4. That Mosell Equities requested that Berryhill & Company, Inc. repay the loaned funds, and Berryhill & Company, Inc. refused.
5. That no genuine issue of material fact exists that Berryhill & Company, Inc. has breached its contract with Mosell Equities, and Mosell Equities is therefore entitled to recover the total loaned funds of \$405,000.00 plus interest accumulating according to Idaho Code § 28-22-104.

DATED this 22<sup>nd</sup> day of March, 2010.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22<sup>nd</sup> day of March, 2010, I served the foregoing, by having a true and complete copy delivered via hand delivery to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



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ERIC R. CLARK

NO. \_\_\_\_\_ FILED \_\_\_\_\_ 229  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

MAR 22 2010

J. DAVID NAVARRO: CLERK  
BY \_\_\_\_\_ DEPUTY  
RECORDED

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**AFFIDAVIT OF GLENN E. MOSELL**

STATE OF IDAHO            )  
                                  ) ss.  
County of Ada            )

GLENN E. MOSELL, being first duly sworn, and upon personal knowledge of the facts  
and circumstances recited herein, deposes and states:

1. I am over the age of 18 years, and I have personal knowledge of the facts as stated  
in this affidavit.



2. I am the manager of Mosell Equities, LLC, Polo Cove Development Company, LLC, and Polo Cove Land Company, LLC.

3. In 2005, I was attempting through these companies to develop a wine country resort hotel, restaurant and equestrian center in the Sunnyslope area of Canyon County, Idaho. I had collaborated with Paul Beckman and Foad Roghani on the land acquisition and entitlement of what we called Polo Cove. **Exhibit 1** is a true and correct copy of an "Illustrative Map" of the property that would encompass the Polo Cove project and the proposed location of the amenities at Polo Cove.

4. I approached John Berryhill as a potential restaurateur for the Polo Cove project that summer. Berryhill told me he was a believer in the future of Idaho wine country and would love to be associated with the project, but he indicated he lacked capital to build a restaurant or to invest in the project.

5. I developed what I thought was a friendship with Berryhill and my company agreed to pay him consulting fees for his help in designing the wine country restaurant that was a small part of the overall Polo Cove project. Mosell Equities paid Berryhill consulting fees totaling \$25,000 between September 2005 and February 2007.

6. In 2005 I also became interested in the partnering with John Berryhill in the ownership of his restaurant, located on Broadway, in Boise, Idaho. Berryhill and I discussed creating an entity that would purchase Berryhill & Company, Inc., which was the entity that owned the Berryhill & Co. restaurant. We also envisioned that this new company would pursue other opportunities.

7. To memorialize our discussions and further plans, John Berryhill created a "Company Development" document which he provided to me. A true and correct copy of that document is attached as **Exhibit 2**.

8. The plan, as I understood, and as confirmed in this document from Berryhill, was that Berryhill and I would form a company (MBI) and that company would purchase Berryhill & Company, Inc., Berryhill's company that owned the restaurant. Berryhill and I would each own 50% of MBI. (**Exhibit 2, paras. 1 and 2.**)

9. Berryhill also indicated in this document that it was his intent as early as the latter part of 2005, to find a location in downtown Boise, to relocate the restaurant. (**Exhibit 2, para. 6.**)

10. Additionally, Berryhill projected that two years later, in 2008, "Another MBI company, Polo Cove Resort Services (PCRS), opens John Berryhill's restaurant in the 1<sup>st</sup> phase of the Polo Cove Resort." (**Exhibit 2, para. 10.**)

11. Berryhill also indicated he envisioned this Company that he and I owned building and operating other restaurants [BCO] and catering operations [GTG] in Eagle, and in Donnelly, (**Exhibit 2, paras. 9 and 12.**).

12. Finally, Berryhill confirmed the plan that MBI would continue to pursue other development projects as those projects became available. (**Exhibit 2, para. 13.**)

13. In March 2007, Berryhill provided a proposal in which Berryhill described his "responsibilities" as we moved forward, and the terms of my "buy in." A true and correct copy of this "proposal" is attached as **Exhibit 3**.

14. I recall that Berryhill provided this document after Berryhill and I met with Attorney Kim Gourley to discuss my “buy in” of the restaurant. The meeting with Mr. Gourley occurred in February 2007.

15. Berryhill also references the “Plaza 121 Building,” in **Exhibit 3**, which was the restaurant space downtown where Berryhill intended to relocate the restaurant operations from the Broadway site. We had not located that space until early 2007.

16. In **Exhibit 3** Berryhill indicated his agreement to “work out the details of Glenn’s Berryhill & Co. [restaurant] buy in.” At that time, as Berryhill confirms, he envisioned creating a company called “MBInc.,” and Berryhill would own 51% and I would own 49% of the shares in that company. (**Exhibit 3, para. 3 a), b) and c)**). I rejected that proposal.

17. Berryhill and I discussed the proposed terms in **Exhibit 3**, and on March 6, 2007, Berryhill submitted a revision of his earlier proposal. A true and correct copy of that document is attached as **Exhibit 4**.

18. After further discussions, Berryhill provided me with a third proposal. A true and correct copy of that document is attached as **Exhibit 5**.

19. I know **Exhibit 5** was the last proposal because we agreed to change the name of the company to “MoBerry,” not “MBInc.,” the name of the company that Berryhill had identified in **Exhibits 2-4**.

20. One point of contention in our negotiations was Berryhill’s proposal in **Exhibit 5**, that MoBerry would pay Berryhill for his “work and time spent on Polo Cove projects.” I disagreed because as indicated in Berryhill’s “Company Development” document, (**Exhibit 2**), the Polo Cove restaurant project applied to the company Berryhill and I owned. We both were working towards that opportunity, the Polo Cove Restaurant project, which would potentially

increase the value of MoBerry, or whatever entity we formed. In other words, as we both were working on that project, it did not appear equitable for John to received compensation *and* equity in MoBerry.

21. Initially, I paid Berryhill as a restaurant consultant. However, in February 2007, as we envisioned the company we each owned, MoBerry, would also own the restaurant at Polo Cove, Berryhill and I agreed that any work either one of us performed in pursuit of the restaurant project at Polo Cove would essentially be sweat equity and we would reap the benefits based on the increased value of the company due to ownership of this restaurant. Thereafter, I did not pay Berryhill a consulting fee and he did not request such a fee for his work related to developing the restaurant project at Polo Cove, an opportunity Berryhill identified as early as 2005 in **Exhibit 2**.

22. We then contacted Kim Gourley and requested that he draft the appropriate legal documents creating "MoBerry" and confirming the terms of the "buy in."

23. True and correct copies of the documents Mr. Gourley drafted, including the proposed MoBerry Articles of Incorporation, the proposed Consent of Shareholders and Directors, and the proposed Bylaws<sup>1</sup> of MoBerry Corporation, are attached as **Exhibit 6**. (Hereinafter, "The Gourley Documents.")

24. Although Mr. Gourley finalized and provided these documents in October 2007, he notes in his cover e-mail that he was using information that the parties had provided in March 2007. Consequently, the references to Mosell Equities' contribution in the Gourley documents address cash, not transferring loaned funds to equity, because when Berryhill and I first contacted Gourley, we did not contemplate the need for Mosell Equities to loan any money.

---

<sup>1</sup> The entire ByLaws are lengthy and essentially boilerplate legalese, so Mosell Equities has provided only the relevant documents.

25. As indicated in **Exhibit 2**, Berryhill and I envisioned the company created when I became a “partner” would potentially have an ownership interest in a “Berryhill” restaurant located at the Polo Cove site. However, unless I bought in or Berryhill found other investors, I understood that Berryhill did not have the financial resources to build and operate a restaurant at Polo Cove on his own.

26. During the spring of 2007, as noted above, the Plaza 121 restaurant space in downtown Boise became available for lease. However, Berryhill did not have the funds to pay for the move. Because Berryhill and I had not yet reached an agreement at that time regarding the terms of my buy in of the restaurant, I agreed that my company Mosell Equities, LLC would provide a loan to fund Berryhill’s relocating the restaurant downtown, which Berryhill had contemplated since 2005, (See **Exhibit 2.**), and that those loaned funds may ultimately fund my buy in.

27. Between June 28, 2007 and April 30, 2008 Mosell Equities, LLC made a loan, in installments, to Berryhill and his company totaling \$405,000.00. Mosell Equities, LLC funded the move by providing Berryhill with a series of checks that Berryhill agreed would constitute and remain a loan. Berryhill also agreed the loan may later be converted to equity in the company that would own the Berryhill & Co. restaurant, as discussed in **Exhibits 2, 3, 4 and 5**, and confirmed later in documents created by a second attorney, discussed below.

28. Mosell Equities’ loans were to be used for restaurant operations and tenant improvements of the new Berryhill & Co. Restaurant at 121 N. 9<sup>th</sup> Street. Boise, Idaho, as Berryhill confirmed in a hand-written contract he and I signed when Mosell Equities made its first loan installment. A true and correct copy of this contract is attached as **Exhibit 7**. I know that is Berryhill’s handwriting and signature, because I watched him draft and sign the contract.

29. Mosell Equities began to write checks constituting the loan to Berryhill in 2007 after he presented his business financials and projected future yearly gross income of \$3,000,000 for the Berryhill & Co. restaurant downtown. Berryhill indicated to me that he projected a \$300,000.00 annual profit to the owners to be divided equally.

30. I also personally signed as Guarantor on the restaurant lease at the Plaza 121 building on April 12, 2007 because I envisioned that either Mosell Equities or I would eventually have a co-ownership interest in the restaurant operated at this location.

31. When I made the first installment of the loan, it was my and Berryhill's intent that the Mosell Equities' loans would ultimately be converted to a 50% equity ownership of Berryhill & Company, Inc., or some other entity that owned Berryhill's restaurant, just as Berryhill states in **Exhibit 7**.

32. I relied on Berryhill's projections when I agreed that Mosell Equities would loan the money and potentially "buy in" to the business.

33. At the end of 2007, Berryhill, the General Manager at the restaurant, Joy Luedtke, the accountant Amy Dempsey, and I met to discuss the buy in. Joy was concerned because while she understood that I was going to buy into the company, that had not happened by the end of 2007. Joy initiated the meeting to discuss just how she should account for the funds that Mosell Equities had provided on the 2007 corporate taxes.

34. Berryhill and I decided that we should wait until some time in 2008 to formalize the buy in. We also agreed at the end of 2007 that the Mosell Equities' funds would remain as a loan to Berryhill & Company, Inc. pending the final buy in.

35. At that time, we agreed that Joy would create a separate account for the Mosell's and the Berryhill's to track "comps" for the 2008 year, which she did. Neither I, nor any one

associated with Mosell Equities or the Polo Cove project “wined and dined” potential investors at Berryhill’s expense, as he now claims.

36. The accountant, Amy Dempsey, also suggested that we reevaluate our decision to create a separate entity in which Mosell Equities and Berryhill & Company, Inc. were shareholders. Ms. Dempsey referred Berryhill and I to tax and business attorney Victoria Meier, and in early 2008, we had a meeting with her and Ms. Dempsey.

37. Ms. Meier reviewed the documents that attorney Kim Gourley had prepared previously and she advised us that a holding company, “MoBerry,” was not necessary at the time and I could use the \$400,000.00 loan that Mosell Equities had made to Berryhill & Company, Inc. for my 50 percent ownership “buy-in” of that restaurant. In order to simplify the arrangement, she suggested that instead of our respective entities [Mosell Equities and Berryhill & Company, Inc.] as shareholders in yet another entity, I personally should just buy in to Berryhill & Company, Inc.

38. Berryhill and I agreed to execute this “buy in” and convert the loan during the tax year 2008 and Ms. Meier created the appropriate legal forms. Those documents, including a Special Meeting of the Board of Directors and Shareholders of Berryhill & Company, Inc., a Stock Purchase Agreement, a Satisfaction of Loan, and a copy of the Stock Certificate No. 3, are attached as **Exhibit 8**. (Hereinafter “The Meier Documents.”)

39. In paragraph 21 of Berryhills’ Counterclaim, he states, “The funds provided by Mosell Equities were not intended to constitute a loan, but rather an investment by Mosell Equities into the joint effort at developing Polo Cove.” However, the documents that Victoria Meier drafted after our meeting in early 2008, which she created as Counsel for Berryhill & Company, Inc., confirm that Berryhill understood the funds were loans to Berryhill & Company,

Inc. as recently as early 2008, and Ms. Meier specified her understanding of the purpose of the loans; "WHEREAS, during the calendar year of 2007, Mosell loaned the Corporation Four Hundred Thousand Dollars (\$400,000) to fund the relocation of the Corporation's restaurant and for capital improvements needed for the Corporation's restaurant and banquet rooms (the "Loan"). (Exhibit 8, Stock Purchase Agreement p. 1.)

40. I have reviewed Ms. Meier's documents and based on my participation in the meeting with Berryhill in early 2008, I believe these documents accurately reflect our agreement. The funds were a loan and that I would accept 200 shares of Berryhill & Company, Inc. as full repayment of the loan. Ms. Meier drafted these documents based on terms we provided to her during this meeting, and nowhere in these documents is there any mention of the loaned funds actually being an investment in Polo Cove.

41. As indicated Ms. Meier's cover letter, she sent copies of these forms to both me and Berryhill. At no time in 2008 did Berryhill ever tell me he believed the forms Ms. Meier provided had any errors or were factually inaccurate in any way.

42. Nor did I ever receive any other forms from Ms. Meier with any changes or corrections, although Ms. Meier represented Berryhill & Company, Inc. I assumed that Berryhill had approved the forms because he never had his attorney send any additional forms.

43. In the latter part of 2008, although we had the Meier Documents ready to sign, we had not concluded our "buy in" and although the restaurant was operating profitably and Berryhill was earning an income, there was no compensation for me or Mosell Equities.

44. I am not aware that Berryhill invested any funds, either those obtained as loans from Mosell Equities, or from any other source, into the Polo Cove project.



45. To date, neither Berryhill nor his company has repaid Mosell Equities' loans, and neither me nor Mosell Equities has an equity ownership of Berryhill & Co. Restaurant at 121 N. 9<sup>th</sup> Street, Boise, Idaho, or any other company created by Berryhill. Although benefiting from the loaned funds, Berryhill retains all income from the restaurant.

46. In addition to the \$405,000 loan and the \$25,000 consulting fees, Mosell Equities LLC paid \$20,000 to the General Account of Berryhill & Company for miscellaneous expenses incurred by Mosell Equities LLC or Polo Cove Development Company, LLC.

47. Initially, Berryhill rented approximately 6,000 sq. ft. of space for the restaurant downtown, but left the catering operation and restaurant administrative offices at the Broadway location. In the latter part of 2007, Berryhill decided to move the catering operation and administrative offices to the site downtown, and needed additional room to do so. Berryhill then leased an additional 7,000 sq. feet of space near the existing restaurant that he used for ballrooms/banquet rooms, for kitchens for Berryhill's catering operations, and for Berryhill & Company, Inc. administrative offices. Of the approximately 13,000 sq ft Berryhill leased, he sublet approximately 1,500 sq ft. to Mosell Equities so Mosell Equities could operate a small showroom/office for the Polo Cove project. This sublease was not in writing, and Mosell Equities understood the sublease was a month-to-month lease.

48. Mosell Equities, LLC paid space rent totaling \$25,363 between December 04, 2007 and July 16, 2008 to Berryhill & Company for the use of the "Polo Cove Wine Bar and Sales Office" space. Berryhill did not contribute rent for this space.

49. During the summer of 2008, I suggested to Berryhill that he should sub-lease the "Polo Cove Wine Bar and Sales Office" to an alternative user (Starbucks, wine bar, gourmet

market, etc...). Berryhill refused and stated the space had to remain a part of the "Berryhill Ballrooms."

50. Berryhill & Company has not compensated Mosell Equities, for \$8,516, the costs of the furnishings in the "Polo Cove Wine Bar and Sales Office," which Berryhill continues to use.

51. In the latter part of 2008, we had not concluded our "buy in" and although the restaurant was operating profitably and Berryhill was earning an income, there was no compensation for me or Mosell Equities.

52. In September, 2008, I approached Berryhill and indicated we either needed to consummate the "buy in" so Mosell Equities could benefit from the restaurant profits, or Mosell Equities wanted its money back. After this request, Mr. Berryhill simply refused to have any further discussion.

53. Berryhill would not return my phone calls and avoided me when I came to the restaurant, so I retained an attorney who drafted and sent a demand letter to Berryhill. A true and correct copy is attached as **Exhibit 9**.

54. In response, Berryhill, through his attorney, claimed that "the funds described in our letter and claimed by Mr. Mosell or Mosell Equities, LLC **did not constitute a loan** to John Berryhill or Berryhill & Company, Inc." (A true and correct copy of this letter is attached as **Exhibit 10**.) Until I received this letter, I had never heard Berryhill contend the loaned funds were an investment in Polo Cove, nor had I ever seen any document created by Berryhill, Mr. Gourley, Ms. Meier, or anyone else that stated such a contention.

55. I did not intend to simply give John Berryhill over \$400,000.00. The deal was the loaned money would be used to "buy in" to a company that owned Berryhill & Company, Inc. or

directly into that company. When Berryhill refused to consummate the “buy in” in October 2008, although we had all of the requisite documents drafted by an attorney for that purpose, I then demanded Berryhill return the loan funds. Berryhill refused.

56. I had business cards created in which I indicated that John Berryhill was a “Partner” in the Polo Cove project. I had those cards made in anticipation of a sales effort in which our company, MoBerry or some other company which Berryhill and I owned, would promote Berryhill as a celebrity chef who had “partnered” in the restaurant aspect of the project. In other words, the “Partner” designation indicated Berryhill was *collaborating* in the project as the restaurateur – nothing more.

57. I am not aware of any partnership agreement, contract or other document that I signed, either personally or for Mosell Equities, that addressed an ownership interest in the Polo Cove project in which John Berryhill or his company was a party.

58. As confirmed in **Exhibit 2**, Berryhill and I envisioned that the company we created may ultimately have owned a restaurant that may have been built as part of the Polo Cove project, and both of us spent time and exerted efforts towards the opportunities Berryhill identified in **Exhibit 2** as we moved towards finalizing our “partnership.” However, while those opportunities did not materialize, including the restaurant at Polo Cove, the repayment of the loan from Mosell Equities was not contingent upon the success of any enterprise or venture and I am not aware of any document that indicates otherwise. Either we consummated the “buy in,” or Mosell Equities was entitled to its money back.

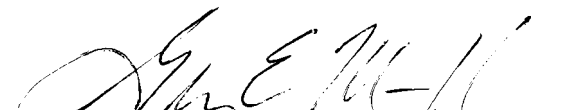
59. Berryhill refused to sign the documents thereby entitling me or Mosell Equities to an ownership interest in the Berryhill & Co. restaurant, so the anticipated “buy in” never occurred.

60. **Exhibit 11** is a true and correct copy of the transcript of the deposition of Joy Luedtke, Berryhill & Company, Inc. General Manager.

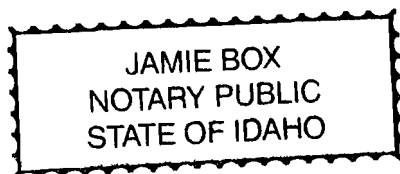
61. **Exhibit 12** contains true and correct copies of the ten checks that Mosell Equities wrote to Berryhill & Company, Inc. that constituted the loan.<sup>2</sup>


I declare under penalty of perjury under the laws of the State of Idaho and the laws of the United States, that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 22nd day of March 2010.

  
Glenn E. Mosell

SUBSCRIBED AND SWORN to before me this 22nd day of March 2010.



 208-938-1478  
NOTARY PUBLIC for the State of Idaho  
Residing at: Eagle, Idaho  
My Commission expires: 1-18-2014

<sup>2</sup> The first check, for \$50,000.00, dated June 28, 2007, is also the check in Exhibit 7, Berryhill's handwritten contract indicating he understood and acknowledged the funds were a loan.

# **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22<sup>nd</sup> day of March, 2010, I served the foregoing, by having a true and complete copy delivered via hand delivery to:

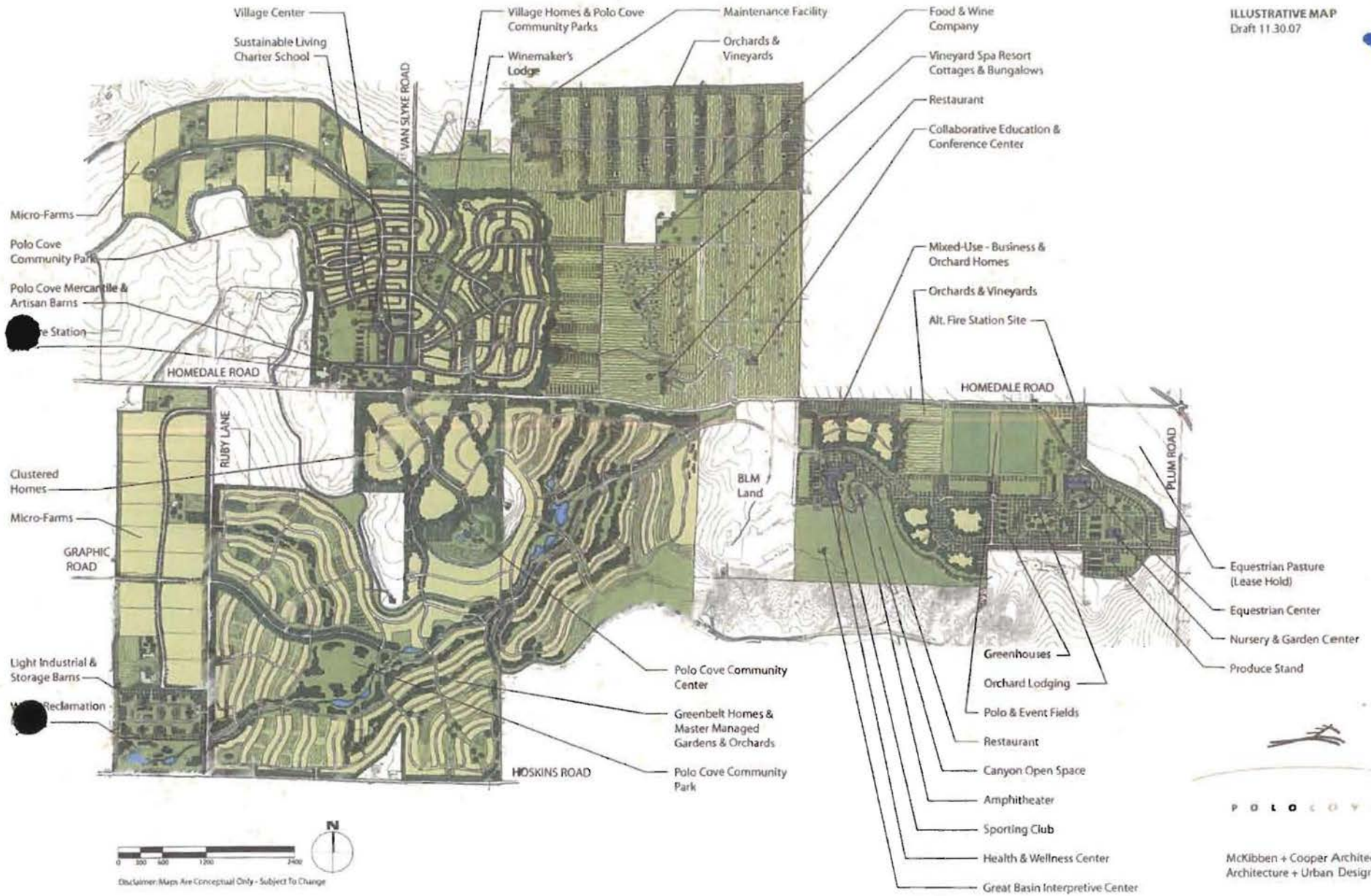
Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



---

ERIC R. CLARK

ILLUSTRATIVE MAP  
Draft 11.30.07



## John Berryhill

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**Subject:** BCO Development

**Status:** Not Started

**Percent Complete:** 0%

**Total Work:** 0 hours

**Actual Work:** 0 hours

**Owner:** John Berryhill

This company development spans over the course of 2 years, in the order according to the following approximated timeline:

2006

1. John Berryhill and Glenn Mosell form **MB Incorporated** (MBI) as a 50/50 partnership.
2. MBI purchases **Berryhill & Co. Incorporated** (BCO).
3. Changes to the BCO model begin.

- I. John Berryhill moves out of daily operations all together.
  - He will not have an office on site.
  - He will work from home; however he will be in daily during the transition.
  - He will still perform his "face" duties on the floor.
  - An executive chef will be hired in the future, will assume John's "face" duties and work with Allen on specials.

- II. BCO General Manager: Mary Gendron
  - Key company figure over Café and Wine Bar, Special Events Catering, and Gourmet To Go Catering.
  - She will take John's old office.
  - Coordinates the efforts of the department managers.
  - Manages her own department (finance-office).
  - Answers to corporate officers of MB Inc.

- III. Company Departments:

• Finance-Office	Manager - Mary Gendron	1 full time secretary, 1 part-time asst. bookkeeper
• GTG Catering	Manager - Chip Czupka	1 part-time employee (filling in for Chip)
• Special Events Catering	Manager - Mark Henderson	1 part-time in office/bar boy + 5-10 part-time caterers
• Café and Wine Bar	Co-Managers - Robert Parker Harmony Anderson and Tracey Meyer	6-7 part-time servers and hosts etc.
• Kitchen	Co-Managers - Allen Barrett Bryan Fulkerson	5 full time line cooks (2 am, 3 pm), 1 part-time cook, 2 dishroom, 1 part-time delivery driver

4. BCO focuses on changes to departmental models.

- I. Special Events Catering
  - Design and coordination, wedding consulting, party planning etc., become a separate charged entity.
  - We will offer our catering and staffing services to individual party planners who will then refer and hire us.
  - (we handle the full service food, staffing if needed, ordering of rentals if needed and insurances)

- II. GTG Catering
  - Begin to re-structure this division with a larger menu offering for delivery still, but also with an onsite counter with deli cases etc. filled with pre-made salads, sandwiches and desserts where individuals can order and pickup.

5. MBI purchases the Broadway Park strip mall then beautifies the exterior and boosts the "all under market value" rents and leases.

2007

6. MBI finds and develops a downtown parcel for the BCO Café and Wine Bar, with loft condos above.
7. BCO re-defines it's space at Broadway Park to the original, plus a little extra for offices.
  - I. The Café and Wine Bar with banquet facilities would move downtown (this will happen obviously in conjunction with the downtown development's timeline).
  - II. The Special Events Catering and GTG would stay.
  - III. The general and catering offices would stay.
  - IV. GTG would have a storefront, and the new model would begin.
8. MBI publishes John Berryhill's first cookbook.
9. MBI either finds and develops land or just leases a space in Eagle for another BCO GTG location .

2008

10. Another MBI company, Polo Cove Resort Services (PCRS), opens John Berryhill's restaurant in the 1st phase of it's Polo Cove Resort.
11. MBI will sell Broadway Park.
12. MBI will find and develop land or just leases a space in Donnelly for another BCO GTG location.
13. MBI will continue it's development projects with other BCO GTG locations, PCRS restaurants, hotel, club and spa.



## John Berryhill

---

**Subject:** Glenn Mosell and Polo Cove  
**Start Date:** Thursday, July 14, 2005  
**Due Date:** Thursday, March 01, 2007  
**Priority:** High

**Status:** In Progress  
**Percent Complete:** 50%

**Total Work:** 0 hours  
**Actual Work:** 0 hours

**Owner:** John Berryhill

- **John Berryhill's responsibilities:**

**Berryhill & Co.** - daily duties common to running a company as it's president, owner and executive chef, weekly café specials, recipe design, cooking class research and development and teaching, working in the kitchen at times, team leader and front man for the company, tasting-choosing-writing-editing my wine and restaurant menus, continually revising gtg and catering menus, marketing and advertising including our website, plan short and long term development strategies (like gtg development in places like Eagle, Nampa, and Tamarack), working on my cookbook (which I really need to finish), etc, etc, etc.

**MBInc.** - working with Glenn, dealing with this lawsuit against Mike Matzek, focusing on the move downtown (how we will fit in the Estrella space, the # of seats that make the most sense, design and setup of two kitchens, dining, banquet room and offices, working on what happens to the current Berryhill space, working on Glenn's involvement with Berryhill and the buy in, etc.

**Polo Cove** - working with Glenn, being a front man for the resort phase, coordinating the design/architectural team on the resort phase buildings (mainly Berryhill's Restaurant and Cottages Inn), coordinating the website design and development with Tom Foerstel, developing the hospitality concept at polo cove which includes food-beverage-catering, event and concierge services, research and development design of the Berryhill's Restaurant there, designing the menu style as executive chef, etc, etc, and everything else that will potentially come my way as this starts to unfold..

- **John Berryhill's Compensation and Glenn Mosell's Berryhill Buy In:**

1) \$175 per hour consultant-designer fee

Averaged at 10 hours per week, as of February '07, would equal \$1750 per week or \$7583.33 per month.

Half - \$87.50 per hour paid in cash at \$3791.67 per month.

Half - \$87.50 per hour considered as *sweat equity value* at \$3791.67 per month, to be formally placed in polo cove investment ie: land, building or stock.

2) My time invested each week will increase the closer we get to completion on the opening of the restaurant and hotel at Polo Cove. Eventually I will receive a salary from the restaurant / hotel...or some sort of compensation, though depending on the development at the time, my consulting wage may continue or some sort of compensation, etc.

3) We will work out the details of Glenn's Berryhill & Co. buy in amounts with our attorney Kim Gourley:

a) we form MBInc, a corporation owned solely by you and I

b) I bring 49% of BCO stock to the table valued at \$387,000.00

c) you match my 49% with \$387,000.00 cash

\$187,000 to wipe out BCO debt

\$50,000 to ti's for downtown location

\$25,000 to facilitate the move and additional capital for bco

\$125,000 to me (\$50,000.00 cash payment / \$75,000.00 into the Plaza 121 Building equity)

4) I will stay an employee of BCO, and will continue to receive my salary

5) We will figure out together whatever perks we want to assign to ourselves from Berryhill (we will also need to decide how we will record them, etc).

6) Profits from BCO will be filtered through to MBInc. (we will have to decide what to do with them, ie: split up and pocket or re-invest, etc).

7) Polo Cove will continue to be billed accordingly for it's account (ie: lunch meetings etc), and will be paid to BCO by Mosell Equities, unless a change is made later.

**John Berryhill**

**Subject:** JB, Glenn Mosell-Berryhill's/MBInc/Polo Cove  
**Start Date:** Thursday, July 14, 2005  
**Due Date:** Thursday, March 01, 2007  
**Priority:** High  
  
**Status:** In Progress  
**Percent Complete:** 50%  
  
**Total Work:** 0 hours  
**Actual Work:** 0 hours  
  
**Owner:** John Berryhill

*Retain Revised 3/6/07*

• **John Berryhill's responsibilities:**

**Berryhill & Co.** - daily duties common to running a company as it's president, owner and executive chef, weekly café specials, recipe design, cooking class research and development and teaching, working in the kitchen at times, team leader and front man for the company, tasting-choosing-writing-editing my wine and restaurant menus, continually revising gtg and catering menus, marketing and advertising including our website, plan short and long term development strategies (like gtg development in places like Eagle, Nampe, and Tamarack), working on my cookbook (which I really need to finish), etc, etc, etc.

**MBInc.** - working with Glenn, dealing with this lawsuit against Mike Matzek, focusing on the move downtown (how we will fit in the Estrella space, the # of seats that make the most sense, design and setup of two kitchens, dining, banquet room and offices, working on what happens to the current Berryhill space, working on Glenn's involvement with Berryhill and the buy in, etc.

**Polo Cove** - working with Glenn, being a front man for the resort phase, coordinating the design/architectural team on the resort phase buildings (mainly Berryhill's Restaurant and Cottages Inn), coordinating the website design and development with Tom Foerstel, developing the hospitality concept at polo cove which includes food-beverage-catering, event and concierge services, research and development design of the Berryhill's Restaurant there, designing the menu style as executive chef, etc, etc, and everything else that will potentially come my way as this starts to unfold..

• **John Berryhill's Compensation and Glenn Mosell's Berryhill Buy In:**

1) We will work out the details of Glenn's Berryhill & Co. buy in amounts with our attorney Kim Gourley:

- a) MBInc, either a c-corp. or llc. is formed by Glenn and I, in a 50%/50% partnership
- b) I bring 100% of BCO stock to the table valued at \$387,000.00
- c) Glenn matches my 100% with \$387,000.00 cash

\$187,000 to wipe out BCO debt  
 \$50,000 to tl's for downtown location  
 \$25,000 to facilitate the move and additional capital for bco  
 Distribution tbd:

\$125,000 to me (\$50,000.00 cash payment / \$75,000.00 into the Plaza 121 Building equity)

- d) I am compensated via MBInc, for additional work on MBInc and Polo Cove projects, with income (as in bonuses or tbd) and stock options etc

2) I will stay an employee of BCO, and will continue to receive my salary

3) We will figure out together whatever perks we want to assign to ourselves from Berryhill (we will also need to decide how we will record them, either through MBInc or BCO).

4) Profits from BCO will be filtered through to MBInc. (we will have to decide what to do with them, ie: split up and pocket or re-invest, and at what economic %, etc).

5) Polo Cove will continue to be billed accordingly for it's account (ie: lunch meetings, etc), and will be paid to BCO by Mosell Equities (?), unless a change is made later.

4

## John Berryhill

---

**Subject:** JB, Glenn Mosell-Berryhill's/MBInc/Polo Cove  
**Start Date:** Thursday, July 14, 2005  
**Due Date:** Thursday, March 01, 2007  
**Priority:** High

**Status:** In Progress  
**Percent Complete:** 50%

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**Owner:** John Berryhill

- **John Berryhill's responsibilities:**

**Berryhill & Co.** - daily duties common to running a company as it's president, owner and executive chef, weekly café specials, recipe design, cooking class research and development and teaching, working in the kitchen at times, team leader and front man for the company, tasting-choosing-writing-editing my wine and restaurant menus, continually revising gtg and catering menus, marketing and advertising including our website, plan short and long term development strategies (like gtg development in places like Eagle, Nampa, and Tamarack), working on my cookbook (which I really need to finish), etc, etc, etc.

**MoBerry Corporation** - working with Glenn, dealing with this lawsuit against Mike Matzek, focusing on the move downtown (how we will fit in the Estrella space, the # of seats that make the most sense, design and setup of two kitchens, dining, banquet room and offices, working on what happens to the current Berryhill space, working on Glenn's involvement with Berryhill and the buy in, etc.

**Polo Cove** - working with Glenn, being a front man for the resort phase, coordinating the design/architectural team on the resort phase buildings (mainly Berryhill's Restaurant and Cottages Inn), coordinating the website design and development with Tom Foerstel, developing the hospitality concept at polo cove which includes food-beverage-catering, event and concierge services, research and development design of the Berryhill's Restaurant there, designing the menu style as executive chef, etc, etc, and everything else that will potentially come my way as this starts to unfold..

- **John Berryhill's Compensation and Glenn Mosell's Berryhill Buy In:**

- 1) We will work out the details of Glenn's Berryhill & Co. buy in amounts with our attorney Kim Gourley:
  - a) MoBerry, a c-corp. is formed by Glenn and I, as a 50%/50% partnership
  - b) I bring 100% of BCO stock (1000 shares) to the table valued at \$387,000.00
  - c) Glenn matches my 100% with \$387,000.00 cash
    - \$187,000 to wipe out BCO debt
    - \$75,000 to ti's for downtown location and the move
    - Distribution tbd:
      - \$125,000 to me (\$50,000.00 cash payment / \$75,000.00 into the Plaza 121 Building equity)
- 2) I will stay an employee of BCO, and will continue to receive my salary plus perks as it's president-ceo
- 3) Profits from BCO will be filtered through to MoBerry Corporation (we will have to decide what to do with them, ie: split up and pocket or re-invest, and at what economic %, etc).
- 4) Polo Cove will continue to be billed accordingly for it's account (ie: lunch meetings, etc), and will be paid to BCO by Mosell Equities (?), unless a change is made later.
- 5) I will still be compensated for my work and time spent on Polo Cove projects.



[Print] [Close]

From: "Kimbell D. Gourley" <kgourley@idalaw.com>  
To: <mosell@att.net>, <John@Berryhillandco.com>  
Subject: RE: MoBerry  
Date: Tuesday, October 16, 2007 12:04:09 PM

Glenn and John:

Attached are the articles of incorporation, bylaws, initial corporate resolutions, stock certificates, stock ledger, a bill of transfer for John to transfer 90% or 180 shares of Berryhill & Co to the new corporation as his capital contribution, a bill of transfer for John to transfer 10% or 20 shares of Berryhill & Co to the new corporation as a separate purchase and sale agreement, and a generic bill of transfer. The two of you had discussed preparation of a redemption agreement between stockholders or putting in some version of a buy/sell clause the bylaws. <<arts\_inc\_profit.pdf>> <<Minutes - shareholders and directors - first consent.doc>> <<Bylaws.doc>> <<Stock Certificate Table.xls>> <<stock certificate 1.doc>>

<<stock certificate 2.doc>> <<Bill of transfer - mosell equities to moberry.doc>> <<Bill of transfer - berryhill 90% to moberry.doc>> <<Bill of transfer - berryhill to moberry.doc>> <<Buy-Sell Clause.doc>>

-----Original Message-----

**From:** Kimbell D. Gourley  
**Sent:** Tuesday, October 16, 2007 7:41 AM  
**To:** mosell@att.net  
**Cc:** John@Berryhillandco.com  
**Subject:** MoBerry

Glenn:

I am sorry I missed your phone call. I will get you drafts of the articles of incorporation, bylaws, initial corporate resolutions, and stock certificates. As you know we never finalized the documents but I dictated drafts and then had some handwritten revisions. All of this was put on hold last March but I will have Sherry finish my revisions and get the drafts to you. I recall that you had discussed inserting some language into the bylaws or executing a buy/sell agreement relating to buying each other out if certain events occurred. A buy/sell agreement has not yet been prepared. Take care. Kim.

Kimbell D. Gourley  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701  
208-331-1170  
208-331-1529 (fax)  
kgourley@idalaw.com

CONFIDENTIAL COMMUNICATION: The information contained in this e-mail  
> message is intended only for the personal and confidential use of the  
> designated recipient named above. If the reader of this message is  
> not the intended recipient or an agent responsible for delivering it to  
> the intended recipient, you are hereby notified that you have received

EXHIBIT **6**

> this document in error, and that any review, dissemination, distribution  
or  
> copying of this message is strictly prohibited. If you have received  
> this communication in error, please notify us immediately at  
> jg@idalaw.com and delete the original message.

**Attachment 1:** arts\_inc\_profit.pdf (application/octet-stream)  
**Attachment 2:** Minutes - shareholders and directors - first consent.doc (application/msword)  
**Attachment 3:** Bylaws.doc (application/msword)  
**Attachment 4:** Stock Certificate Table.xls (application/vnd.ms-excel)  
**Attachment 5:** stock certificate 1.doc (application/msword)  
**Attachment 6:** stock certificate 2.doc (application/msword)  
**Attachment 7:** Bill of transfer - mosell equities to moberry.doc (application/msword)  
**Attachment 8:** Bill of transfer - berryhill 90% to moberry.doc (application/msword)  
**Attachment 9:** Bill of transfer - berryhill to moberry.doc (application/msword)  
**Attachment 10:** Buy-Sell Clause.doc (application/msword)



# ARTICLES OF INCORPORATION

(General Business)

(Instructions on back of application)

The undersigned, in order to form a Corporation under the provisions of Title 30, Chapter 1, Idaho Code, submits the following articles of incorporation to the Secretary of State.

**Article 1:** The name of the corporation shall be:

MoBerry Corporation

**Article 2:** The number of shares the corporation is authorized to issue: 1,000

**Article 3:** The street address of the registered office is: 121 N. 9th Street, Boise, ID 83702

and the name of the registered agent at such address is: John Berryhill

**Article 4:** The name of the incorporator is: John Berryhill

and address of the incorporator is: 121 N. 9th Street, Boise, Idaho 83702

**Article 5:** The mailing address of the corporation shall be:

121 N. 9th Street, Boise, Idaho 83702

**Optional Articles:**

Signature of at least one incorporator:

Typed Name: John Berryhill, Vice President

Typed Name: \_\_\_\_\_

Customer Acct #:

(if using pre-paid account)

Secretary of State use only

g:\corp\forms\corp\_forms\articles\profit.pdf  
Revised 08/2005

Web Form

**CONSENT OF SHAREHOLDERS AND DIRECTORS  
IN LIEU OF ORGANIZATIONAL MEETING**

**THE UNDERSIGNED**, being the Shareholders and Directors of MoBerry Corporation ("Corporation"), an Idaho corporation, do hereby consent to, adopt, ratify and approve in writing the following corporate actions, without a meeting, effective as of October \_\_, 2007, in accordance with the Idaho Business Corporation Act:

**APPROVAL OF FILING OF ARTICLES**

**RESOLVED**, that the actions of the incorporator in executing and filing the Articles of Incorporation of the Corporation as presented to this meeting be, and hereby are, in all respects approved, ratified and confirmed.

**APPROVAL OF BYLAWS**

**RESOLVED**, that the Bylaws, a copy of which has been presented to this meeting, be, and they hereby are, approved and adopted as and for the Bylaws of the Corporation.

**FILINGS WITH THE INTERNAL REVENUE SERVICE**

**RESOLVED**, that Sandra Bolen, CPA, is hereby authorized and directed to proceed with the preparation and filing with the Internal Revenue Service of all documents required for the Corporation.

**ELECTION OF OFFICERS**

**RESOLVED**, that the following individuals were nominated, elected, and qualified to the election of officers of the Corporation to serve until their respective successors are elected and qualified.

President:	Glenn Mosell
Vice President:	John Berryhill
Secretary:	Mikki Mosell
Treasurer:	Amy Berryhill

**AUTHORIZATION OF PAYMENT**

**RESOLVED**, that the Secretary of the Corporation is authorized and directed to procure for the Corporation all corporate books, books of account and membership books required by the statutes of the state of Idaho or necessary or appropriate in connection with the business of the Corporation;

**RESOLVED**, that the Secretary/Treasurer of the Corporation is authorized to pay all charges and expenses incident to or arising out of the organization of the Corporation, and to reimburse any person who has made the disbursements therefor.

#### **CORPORATE SEAL**

**RESOLVED**, that MoBerry Corporation not utilize a seal.

#### **LOCATION OF THE CORPORATION**

**RESOLVED**, that the registered office of the Corporation be established and maintained at 121 N. 9<sup>th</sup> Street, Boise, Idaho 83702, and that the meetings of the Board of Directors from time to time may be held either at the registered office or at such other place (which need not be in Idaho) as the Board of Directors shall designate from time to time.

#### **FISCAL YEAR**

**RESOLVED**, that the fiscal year of the Corporation will commence on January 1<sup>st</sup> and end on December 31<sup>st</sup> each year.

#### **BANK ACCOUNTS**

**RESOLVED**, that \_\_\_\_\_, \_\_\_\_\_ branch, Boise, Idaho, is hereby designated as the bank in which the funds of the Corporation shall be deposited; and that the Treasurer is hereby authorized to open and keep an account in the said bank, in the name of the Corporation, and to cause to be deposited in said bank to the credit of the Corporation any and all moneys, checks, notes, drafts, acceptances, or other evidences of indebtedness belonging to the Corporation and that said bank be, and it is hereby authorized to make payments from the funds of the Corporation according to check or draft signed by the President and/or Secretary/Treasurer of the Corporation of up to the maximum sum of \$10,000; all checks in excess of \$10,000 shall be endorsed by the President and Secretary/Treasurer; and further that the Secretary/Treasurer is hereby authorized to execute such bank resolutions as are necessary for the activities identified herein, and that a copy of all such resolutions shall be attached to the official minutes of the Board of Directors of the Corporation.

#### **SHARES OF THE CORPORATION**

It is deemed advisable by the Board of Directors that the Corporation offer for sale and issue up to \_\_\_\_\_ shares of the common stock authorized by its certificate of incorporation, for consideration not to exceed \$1,000.00 per share; and



It is further deemed advisable that the offer, sale and issue of such shares be effectuated in such a manner that qualified stockholders may receive the benefits of Section 1244 of the Internal Revenue codes; and

There is not now any outstanding offering or portion thereof of the Corporation to sell or issue any of its stock; and

This Corporation is a small business corporation as defined in Section 1244(c)(3) of the Internal Revenue codes;

**RESOLVED**, that the officers of this Corporation, and each of them, are hereby authorized and directed to offer for sale an issue of up to shares of the common stock of the Corporation in a total dollar amount of not more than One Thousand dollars (\$1,000.00) per share. The shares shall be issued as follows:

John Berryhill	387 shares	This sum is to be paid by the in-kind transfer of 180 shares of stock in Berryhill & Co., Inc.
Mosell Equities, L.L.C.	387 shares	Cash

#### **PURCHASE OF STOCK**

**RESOLVED**, the Corporation shall pay to John Berryhill the sum of \$50,000.00 to purchase his remaining 10% (20 shares) of Berryhill & Co., Inc.'s outstanding shares of stock.

#### **UTILIZATION OF CASH RESERVES**

**RESOLVED**, the Corporation shall make a loan or capital contribution to Berryhill & Co., Inc. in the approximate sum of \$262,000.00, which funds are to be utilized by Berryhill & Co., Inc. for the following:

- a) payment of Berryhill & Co., Inc. loan obligation owed to \_\_\_\_\_ in the approximate sum of \$187,000.00;
- b) payment in the approximate sum of \$50,000.00 for tenant improvements located at Berryhill & Co., Inc.'s new restaurant site at 121 N. 9<sup>th</sup> Street, Boise, Idaho;
- c) the approximate sum of \$25,000.00 to be used to pay for moving expenses incurred to relocate Berryhill & Co., Inc.'s restaurant to its new location at 121 N. 9<sup>th</sup> Street, Boise, Idaho.

**NEXT MEETING**

**RESOLVED**, that the next meeting of the Board of Directors of the Corporation shall be held on January 21, 2008, at the office of the Corporation.

DATED this \_\_\_\_\_ day of October, 2007.

\_\_\_\_\_  
Mikki Mosell  
Secretary

APPROVED:

\_\_\_\_\_  
Glenn Mosell  
President

**BYLAWS  
OF  
MOBERRY CORPORATION**

MOSELL EQUITIES LLC  
P.O. BOX 1694  
EAGLE, ID 83616

92-7014/3241  
0097002028

5127

DATE

4/28/07

PAY TO  
THE ORDER OF

Berryhill & Co

\$ 50,000

Fifty Thousand no/100

DOLLARS



Home Federal

MEMO

loan

HomeLine #488-0000  
EAGLE BRANCH  
100 E. RIVERSIDE DR. EAGLE, ID 83616

*[Signature]*

⑆324170140⑆

0097002028 5127

This is a loan from Mosell Equities to cover  
some misc. downtown expenses during our bookkeeper  
transition. It will go into the general check register &  
be used for any billing of payables needed for downtown  
or Berryhill & Co.  
It will be transitioned into part of Glenn's "buy in" of  
Motenry Venture Corp. Inc.

*[Signature]*

*[Signature]*

EXHIBIT

7

000351

**EBERLE, BERLIN, KADING, TURNBOW, MCKLVEEN & JONES,**

**CHARTERED**

ATTORNEYS AND COUNSELORS AT LAW  
BOISE PLAZA  
1111 WEST JEFFERSON STREET, SUITE 530  
POST OFFICE BOX 1368  
BOISE, IDAHO 83701

TELEPHONE  
(208) 344-8535

FACSIMILE  
(208) 344-8542

L. VICTORIA MEIER  
E-MAIL: [vmeier@eberle.com](mailto:vmeier@eberle.com)

February 27, 2008

**PRIVATE AND CONFIDENTIAL**

John Berryhill, President  
Berryhill & Company, Inc.  
121 North 9th Street, Suite 102  
Boise, Idaho 83702

Glenn E. Mosell  
Post Office Box 1694  
Eagle, Idaho 83616

Re: *Stock Purchase Agreement*

Dear John & Glenn:

Please find enclosed the following documents reflecting the proposed stock purchase by Glen:

- (1) Special Meeting of the Board of Directors and Shareholders of Berryhill & Company, Inc.
- (2) Stock Purchase Agreement
- (3) Satisfaction of Loan
- (4) Copy of the Stock Certificate No. 3.

Please review these documents carefully to ensure that the documents meet with your approval. If they do, please contact me and I will arrange to have final copies sent to you for original signature. If you have any comments or changes contact me to discuss.

Additionally, if you have not done so already, please review the existing Bylaws and Restrictive Purchase and Redemption Agreement of the Company. Neither document has been executed. However, in the interest of saving costs and provided they meet with your approval, I can prepare a one-page agreement, stating that the two of you intend to be bound by these two agreements.

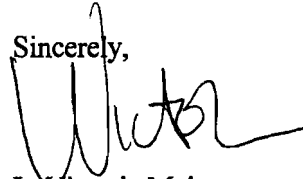
EXHIBIT 8

000352

February 26, 2008  
Page 2

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Sincerely,

A handwritten signature in black ink, appearing to read 'L. Victoria Meier', with a stylized, flowing script.

L. Victoria Meier

LVM  
cc: A. Dempsey

**DRAFT**

**BERRYHILL & COMPANY, INC.  
SPECIAL MEETING OF THE  
BOARD OF DIRECTORS AND SHAREHOLDERS**

**Effective the December 31, 2007**

The undersigned, being Secretary of BERRYHILL & COMPANY, INC., an Idaho corporation (the "Company"), by this instrument evidences the actions and resolutions undertaken at the special meeting of the Board of Directors and Shareholders of the Company. Present was the sole Shareholder and the Directors who waived notice of the meeting.

**WHEREAS**, the Company has borrowed Four Hundred Thousand Dollars from Glenn E. Mosell for the funding of the relocation of the Company's restaurant to a new location and for the capital improvements to be made to the restaurant and banquet rooms.

**WHEREAS**, Glenn E. Mosell desires to acquire an interest in the Company in exchange for, and as repayment of, the amount lent to the Company.

**WHEREAS**, the Directors and the Sole Shareholder believe it is in the best interest of the Company to issue Glenn E. Mosell two hundred (200) shares of the common capital stock of the Company as repayment of the amount lent to the Company.

**RESOLVED**, that upon receipt of the Satisfaction of Loan evidencing that the Company's obligation to Mosell has been paid, the Directors are hereby authorized to issue two hundred (200) shares of the one dollar (\$1) par value common capital stock of the Company to Mosell.

**RESOLVED**, that the Officers of the Company are authorized and directed to execute any agreements and documents in connection with the issuance of the two hundred (200) shares of the Company's common capital stock.

There being no unattended business to come before the meeting, the meeting was adjourned.

DATED effective as of the 31<sup>st</sup> day of December, 2007.

By: \_\_\_\_\_  
Amy Berryhill  
Its: Secretary

**DRAFT**

## **STOCK PURCHASE AGREEMENT**

THIS STOCK PURCHASE AGREEMENT (hereinafter "Agreement") is made and entered into effective the \_\_\_\_ day of \_\_\_\_\_, 2007, by and between **BERRYHILL & COMPANY, INC.**, an Idaho corporation (the "Corporation"), and **GLENN E. MOSELL**, a married man dealing with his separate property ("Mosell").

### **WITNESSETH:**

WHEREAS, John Berryhill (the "Shareholder") is the sole shareholder and record owner of two hundred (200) shares, \$1.00 par value, of the issued and outstanding common capital stock of **BERRYHILL & COMPANY, INC.**, an Idaho corporation (hereinafter the "Corporation"). John Berryhill's shares represent one hundred percent (100%) of the issued and outstanding common capital stock of the Corporation and are evidenced by Certificates No. 1 and No. 2.

WHEREAS, during the calendar year of 2007, Mosell loaned the Corporation Four Hundred Thousand Dollars (\$400,000) to fund the relocation of the Corporation's restaurant and for capital improvements needed for the Corporation's restaurant and banquet rooms (the "Loan").

WHEREAS, the Corporation desires to issue two hundred (200) shares of the Corporation's common capital stock to Mosell as repayment of the Loan. Mosell desires to accept the two hundred (200) shares of the Corporation's common capital stock as repayment of the Loan and to have the Loan reclassified on the Corporation's books and records as a capital contribution from Mosell.

WHEREAS, after the execution of this Agreement, Mosell and the Shareholder will each own fifty percent (50%) of the common capital stock of the Corporation.

WHEREAS, the Directors of the Corporation and the Shareholder have agreed that it is in the best interest of the Corporation to authorize and to admit Mosell as a shareholder of the Corporation and to reclassify the Loan as a capital contribution from Mosell as payment for the two hundred (200) shares pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, Corporation, Shareholder, and Mosell agree as follows:

1. **Issuance of Stock.** The Corporation shall issue two hundred (200) shares of the common capital stock of the Corporation (the "Shares") in the name of Glenn E. Mosell evidenced by Certificate No. 3.
2. **Subscription Price.** The subscription price for the Shares shall be Four Hundred Thousand Dollars (\$400,000).
3. **Payment of Subscription Price.** Mosell shall pay the Subscription Price by canceling the Loan and thereafter authorizing the Corporation to reclassify the Loan on the Corporation's books and records as a capital contribution from Mosell to the Corporation.



4. **Closing.** The transactions contemplated herein shall close on or before March \_\_\_\_\_, 2008, at a place and at a time mutually agreeable by the parties.

5. **Closing Obligations.**

a. Closing Obligations of Corporation. At Closing, the Corporation shall deliver to Mosell Certificate No. 3 issued in Mosell's name evidencing ownership of the Shares.

b. Closing Obligations of Mosell. At Closing, Mosell shall present to the Corporation Satisfaction of Loan evidencing that the Loan has been paid in full.

6. **Warranties of Corporation.** The Corporation warrants to Mosell that:

- (a) The Corporation has the full power and authority to issue such Shares;
- (b) The transactions contemplated herein have been authorized and approved by the Corporation's Directors and Shareholder in a meeting duly called for that purpose; and
- (c) The Shares are not subject to any liens, encumbrances, or restrictions except those imposed under this Agreement.

7. **Restrictions on Transfer.** Mosell may not sell, transfer, convey, or alienate the Shares to any person without the prior unanimous approval of the shareholders of the Corporation. The Shares are further restricted as set forth in the Corporation's Restrictive Stock Purchase And Redemption Agreement, which restrictions are incorporated herein by reference as if set forth herein in full. A conspicuous legend setting forth such restrictions shall be placed upon the Certificate representing the Shares.

8. **Familiarity with Corporation.** Mosell acknowledges familiarity with the business of the Corporation and has made such investigations as Mosell has determined are prudent or necessary with respect to the value of the Corporation and the Shares being acquired by Mosell hereunder. Mosell acknowledges that the Corporation has made available to Mosell all reasonable information concerning the Corporation requested by Mosell in connection with Mosell's investigation. Mosell agrees to keep strictly confidential all information disclosed to Mosell by the Corporation in connection with Mosell's investigation.

9. **Integration Clause.** This Agreement, together with the Corporation's Bylaws and Restrictive Stock Purchase And Redemption Agreement, encompass the entire agreement of the parties hereto with respect to the subject matter of this Agreement. Such agreements may not be modified except by written a document executed by all parties hereto.

10. **Succession.** This Agreement shall inure to the benefit of and be binding upon the parties hereto and upon their successors in interest of any kind whatsoever.

11. **Amendments.** This Agreement may only be amended, modified, or changed by a written document signed by all parties hereto.

12. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original.

**DRAFT**

**13. Governing Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of Idaho.

**14. Time and Waiver.** Time and the prompt performance of each and every obligation of the parties hereto is agreed to be of the essence of this Agreement. Any departure from the conditions and terms of this Agreement, or any delay in the enforcement of the same by either party, shall not operate to waive or be a waiver of the rights of either party to stand upon the strict letter or construction of this Agreement or to require performance in accordance with the express terms set forth herein.

**15. Attorneys Fees.** If either party hereto defaults in any manner or fails to fulfill any and all provisions of this Agreement, and if the non-defaulting party places this Agreement with an attorney to exercise any of the rights of the non-defaulting party upon such default or failure, or if suit be instituted or defended by the non-defaulting party by reason of, under or pertaining to such default or failure, then the non-defaulting party shall be entitled to recover reasonable attorneys fees, costs and expenses from the defaulting party. This paragraph shall be enforceable by the parties notwithstanding any rescission, forfeiture or other termination of this Agreement.

**16. Severability.** In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

**17. Preparation of Documents.** The Corporation has retained the law firm of Eberle, Berlin, Kading, Tumbow & McKlveen, Chartered, to prepare this Agreement and other documents pertaining to this transaction. Mosell acknowledges that the aforementioned law firm represents only the Corporation in this matter and cannot represent his interests in any way. Therefore, Mosell understands he should consult independent legal counsel in the event it has any questions concerning this Agreement.

**18. Further Assurances.** Each of the parties hereto agrees to execute any other documents necessary or appropriate to effectuate the intention of the parties as expressed in this Agreement.

**19. Successor in Interest.** This Agreement shall be binding upon the successors and assigns, personal representatives, heirs, administrators, executors, legatees and devisees of the parties hereto.

**20. No Third Party Beneficiaries.** It is the intention of the parties that no individual or entity shall be construed or considered to be an intended or implied third-party beneficiary under this Agreement, or shall in any way have a right to enforce this Agreement or seek any rights hereunder.

**21. Recitals.** The recitals to this Agreement are incorporated into this Agreement as if set forth in full herein.

IN WITNESS WHEREOF, the parties have executed this Agreement effective the day and year first above written.

**CORPORATION:**

**BERRYHILL & COMPANY**, an Idaho  
corporation

By: \_\_\_\_\_  
**JOHN BERRYHILL**, President

By: \_\_\_\_\_  
**JOHN BERRYHILL**, Shareholder

**MOSELL:**

\_\_\_\_\_  
**GLENN E. MOSELL**

**DRAFT**

**SATISFACTION OF LOAN**

KNOW ALL MEN BY THESE PRESENTS, that **GLENN E. MOSELL**, a married man dealing with his sole and separate property, does hereby certify and declare that the certain Loan in the original amount of Four Hundred Thousand Dollars (\$400,000) made and entered into by **BERRYHILL & COMPANY**, an Idaho corporation, as "borrower", to **GLENN E. MOSELL**, as "lender", is fully paid, satisfied and discharged.

DATED: \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Glenn E. Mosell

STATE OF IDAHO    )  
                          ) ss.  
County of Ada        )

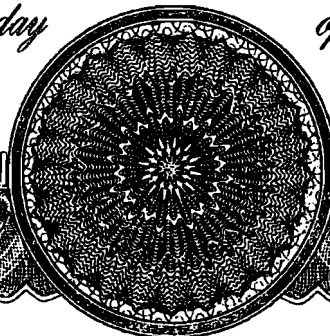
On this \_\_\_\_ day of \_\_\_\_\_, 2008, before me, the undersigned, a notary public in and for said state, personally appeared **GLENN E. MOSELL**, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

\_\_\_\_\_  
Notary Public for Idaho  
My Commission Expires: \_\_\_\_\_

**DRAFT***Note: See the Reserve Side of this Certificate for Restrictions Concerning Transferability of this Stock***This Certifies that****GLENN E. MOSELL***is the**registered holder of***TWO HUNDRED (200)***Shares**transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.**In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed**this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 20 \_\_\_\_\_*\_\_\_\_\_  
President\_\_\_\_\_  
Secretary

00161364.000.DOC



000360

The stock represented by this certificate is not transferable unless approved by the stockholders as set forth in Article 15.1 of the Bylaws of the Corporation, and is subject to the Corporation's Restrictive Stock Purchase and Redemption Agreement.

The securities represented hereby have not been registered under the Securities Act of 1933 or any State Securities Act. Any transfer of such securities will be invalid unless a registration statement under said Act(s) is in effect as to such transfer or in the opinion of counsel for the company such registration is unnecessary in order for such transfer to comply with said Act(s).

If the Corporation has elected to be treated as an "S" corporation, the stock may not be sold to any person or entity which, at such time, would not be a qualified stockholder of an "S" corporation under the Internal Revenue Code.

*For Value Received, \_\_\_\_\_ hereby sell, assign, and transfer  
unto \_\_\_\_\_  
\_\_\_\_\_ Shares  
represented by the within Certificate, and do hereby  
irrevocably constitute and appoint  
\_\_\_\_\_ Attorney  
to transfer the said Shares on the books of the within named  
Corporation with full power of substitution in the premises.  
Dated \_\_\_\_\_ A.D. 20\_\_\_\_  
In presence of \_\_\_\_\_*

NOTICE: THE SIGNATURE OF THIS ASSIGNMENT  
MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE  
FACE OF THE CERTIFICATE, IN EVERY PARTICULAR, WITHOUT  
ALTERATION OR ENLARGEMENT OR ANY CHANGE WHATSOEVER.

PAUL R. MANGIANTINI \*  
SCOTT A. SLOMIK \*\*

\* Admitted to Idaho Bar  
and California Bar

\*\* Admitted to California Bar

LAW OFFICES  
**MANGIANTINI & SLOMIK, LLP**

1191 E. Iron Eagle Drive, Suite 200  
Eagle, Idaho 83616

TEL: (208) 333-9900

FAX: (208) 938-9504

California Office  
770 Tamalpais Dr., Ste. 306  
Corte Madera, CA 94925  
(415) 924-8870

February 20, 2009

John Berryhill  
Amy Berryhill  
Berryhill & Company  
121 North 9<sup>th</sup> Street, Suite 102  
Boise, ID 83702

Re: Repayment of Mosell Loan to Berryhill & Company, Inc.

Dear Mr. and Mrs. Berryhill:

Please be advised that the undersigned has been retained by Glenn Mosell to represent his interest in connection with his claim for repayment of the aggregate loan that he made to Berryhill & Company, Inc. during 2006 and 2007. Please direct all future communication to my attention.

As you know, Berryhill & Company, Inc. borrowed in excess of \$400,000.00 from Mr. Mosell for the funding of the relocation of the Berryhill restaurant to its present location and to pay for capital improvements, equipment and furnishings. We have reviewed a number of documents including, but not limited to, Berryhill & Company, Inc. profit and loss statements, balance sheets, invoices, email communications, documents concerning a proposed stock purchase plan and checks drawn on the Mosell Equities LLC operating account made payable to Berryhill & Company, Inc. Based upon our review of the documentation and our understanding of the business activities involving Mr. Mosell and Berryhill & Company, Inc., it is clear that the legal relationship between Mr. Mosell and Berryhill & Company, Inc. is that of lender to borrower, respectively.

While it may have been contemplated at one point in time that Mr. Mosell was to become a shareholder in your company, the fact remains that no such transaction was ever completed. It is also clear that no effort has been made to repay the loan or enter into an agreement providing for installment payments over time. What has occurred, however, is a cessation of communication from you to Mr. Mosell and an apparent desire on your part to ignore the debt you owe to Mr. Mosell.

The purpose of this letter is to advise you that Mr. Mosell has no alternative but to make demand for repayment of the money that is owed to him by Berryhill & Company, Inc. We understand that \$400,000.00 is a substantial sum of money and that you may require a certain

EXHIBIT 9  
000362

Mr. and Mrs. Berryhill  
February 20, 2009  
Page 2 of 2

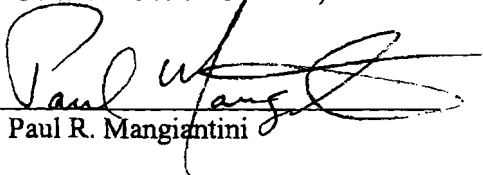
amount of time to raise the funds. We are amenable to working with you to arrive at a solution that takes into consideration the needs of all parties. However, while we are willing to allow a reasonable amount of time for you to address this issue and develop a plan to resolve this problem, we must insist that you respond to this demand on or before March 2, 2009.

If we do not hear from you in a timely manner with an acceptable plan to repay the debt, we will proceed with litigation, obtain a judgment that will include attorney's fees and execute on all available assets. It is not Mr. Mosell's preference to litigate but, if required, he has authorized this firm to move forward quickly and decisively.

We look forward to hearing from you.

Very truly yours,

MANGIANTINI & SLOMIAK, LLP

By:   
Paul R. Mangiantini

PRM/lis  
cc: Glenn Mosell

000363





THOMAS, WILLIAMS  
& PARK

April 2, 2009

**VIA TELEFAX: 938-9504 & U.S. MAIL**

Paul R. Mangiantini  
Mangiantini & Slomiak, LLP  
1191 E. Iron Eagle Dr., Suite 200  
Eagle, Idaho 83616

RE: Glenn Mosell

Dear Paul:

I'm writing in response to your letter of February 20, 2009. There are a number of inaccuracies and mischaracterizations in that correspondence, which I will respond to for you.

First and foremost, the funds described in your letter and claimed by Mr. Mosell or Mosell Equities, LLC, did not constitute a loan to John Berryhill or Berryhill & Co., Inc. ("Berryhills" or "Berryhill & Co."). I believe you will find no note, no security terms, no repayment terms, no interest rate, nor any of the other specific terms necessary in order to sustain the concrete requisites of a *bona fide* loan. Rather, despite the parties' inability to come to terms on any particular written contractual relationship, you will find that the extensive course of dealing indicates that the relevant funds constituted an investment by Mosell Equities, LLC, in a speculative venture dealing with the proposed development of Polo Cove near Sunnyslope in Canyon County, Idaho.

Apparently, Mr. Mosell is a developer and was interested in pursuing the Polo Cove project. He first contacted John Berryhill in approximately July of 2005 to ask him if he would put a restaurant in the development. Over many months of discussions, it was agreed that there would be a joint venture to develop Polo Cove with Mr. Mosell as the "money" man and Mr. Berryhill as a day-to-day operations man. Over the next many months, Mr. Berryhill devoted substantial time to working on the project, meeting with architects, designers, potential vendors, vintners, hotel developers, as well as other interested parties. Mr. Mosell constantly assured Mr. Berryhill that he would "take care of" Mr. Berryhill and that they would get "everything in writing". The roughly three years worth of emails and other documents in the possession of your client substantiate the enormous amount of time Mr. Berryhill devoted to this venture, for which he was not paid.

April 2, 2009

Page 2

At that time, Berryhill & Co. operated a restaurant at the Broadway Park Shopping Center in Boise. As part of the Polo Cove venture, Mr. Mosell eventually insisted that Mr. Berryhill move the restaurant to downtown to a site that would impress people he wanted to interest in Polo Cove, in addition to planning a new restaurant at the Polo Cove site. Mr. Mosell wanted to "splash the pot." Mr. Berryhill made it very clear that the move was too big a financial step for him to take on himself. Mr. Mosell represented that he was not going anywhere, that together they had "big things" to do. Throughout the construction of the new Berryhills restaurant Mr. Mosell told Mr. Berryhill not to "cheap out," not to worry about the cost of the buildout, "go big," "do it sexy." A good portion of the funds identified in your letter were dedicated to this buildout.

Potential investors and other interested parties were wined and dined by Mr. Mosell at the restaurant without charge. Mr. Mosell signed a letter of intent with Tomlinson & Associates for additional space on the ground floor of the same downtown building near the restaurant for a Polo Cove showroom, although Mr. Berryhill advised him it was too big. Mr. Berryhill told Mr. Mosell that this addition would considerably increase their liabilities. Mr. Mosell responded that Mr. Berryhill was not looking at "the big picture." Mr. Mosell could use the space for Polo Cove promotions in the day and Berryhills could use it for banquet and reception facilities in the evening. Mr. Mosell ordered expensive furniture for the space and Berryhills had to cover the remaining half of the cost of this furniture upon delivery. Berryhills is still being charged rent for this additional space.

Mr. Mosell began paying his rent for the promotional area at later and later times each month and had not paid for Polo Cove's portion of the buildout. Then the Polo Cove meetings stopped. Potential investors stopped coming to the restaurant. Others involved in Polo Cove started asking Mr. Berryhill about Mr. Mosell, saying he would not return their calls and they had not been paid for their work. The funds identified in your letter included some amounts paid to attorneys to draft contracts between Berryhill & Co., Inc., and Mosell Equities, LLC, which were not executed. It is my understanding that an amount owed to attorney Kim Gourley is still unpaid.

You will also note that earlier Kim Gourley started out representing both Mosell Equities, LLC, and Mr. Berryhill as co-buyers in a lawsuit arising from a Purchase and Sale Agreement relating to the Broadway Park Shopping Center, where Berryhills then was located (Mr. Gourley was later replaced). At Mr. Mosell's urging, litigation was initiated, which was unsuccessful. Part of the funds that Mr. Mosell is now seeking repayment was for attorney fees arising out of this case.

April 2, 2009

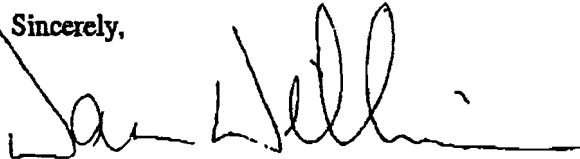
Page 3

Although it is true that certain documents reference "loans" by either Glen Mosell or Mosell Equities, Inc., you will find that the "loan" label was attached because of instructions from Mr. Mosell himself to Berryhills' bookkeeper without Mr. Berryhill's involvement. As such, they represent nothing more than a label that Mr. Mosell unilaterally applied to the funds.

If we calculate the additional costs for which Mr. Berryhill is responsible, including increased rent, buildout of additional space, as well as the enormous contribution of time expended by Mr. Berryhill in the Polo Cove venture, the Berryhills contribution exceeds that identified by Mr. Mosell. Moreover, without Mr. Mosell's inducements into the Polo Cove venture, Berryhills would still be operating at Broadway with much reduced expenses and attendant risk. Because of Mr. Mosell's inducements and representations, Berryhills is responsible for much greater operating expenses in a very challenging environment for restaurants.

In short, Mr. Mosell is now asking John Berryhill or Berryhill & Co. to refund a good part of his speculative investment in Polo Cove, as if Berryhills was a guarantor of that investment. Based on the course of dealing between the parties, it is clear that Berryhills was no such guarantor or borrower. We believe that, after an exhaustive review of the course of dealing involved here over three years, a jury will find that there were no "loans." Accordingly, we must decline your client's invitation to reimburse him for his own investment in this failed venture.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Williams", with a long horizontal line extending to the right.

Daniel E. Williams

DEW:g

## Page 1

MOSELL EQUITIES, an Idaho  
Limited Liability Company,  
  
Plaintiff,  
  
VS. ) No. CV OC 0909974  
  
BERRYHILL & COMPANY, INC., an  
Idaho Corporation, JOHN E.  
BERRYHILL, III, and AMY  
BERRYHILL, individually, and as  
husband and wife,  
  
Defendant.

BOISE, IDAHO

**EXHIBIT**

# DEPOSITION OF JOY LUEDTKE TAKEN 1-13-10

Page 2	Page 4
<p>1 DEPOSITION OF JOY LUEDTKE</p> <p>2</p> <p>3 BE IT REMEMBERED that the deposition of JOY LUEDTKE</p> <p>4 was taken by the attorney for the Plaintiff at the Carty</p> <p>5 Law Office, 380 S. 4th Street, Boise, Idaho, before</p> <p>6 Leda Waddle, a Court Reporter (Idaho No. 758) and Notary</p> <p>7 Public in and for the County of Ada, State of Idaho, on</p> <p>8 Wednesday, the 13th of January, 2010, commencing at the</p> <p>9 hour of 10:07 a.m., in the above-entitled matter.</p> <p>10</p> <p>11 APPEARANCES:</p> <p>12</p> <p>13 For Plaintiff: CLARK &amp; ASSOCIATES</p> <p>14 By: Eric R. Clark</p> <p>15 Post Office Box 2504</p> <p>16 Eagle, Idaho 83616</p> <p>17</p> <p>18 For Defendant: THOMAS, WILLIAMS &amp; PARK, LLP</p> <p>19 By: Daniel E. Williams</p> <p>20 121 N. 9th Street, Ste. 300</p> <p>21 Boise, Idaho 83701</p> <p>22</p> <p>23 Also Present: Glenn Mosell, John Berryhill.</p> <p>24</p> <p>25</p>	<p>1 Whereupon the deposition proceeded as follows:</p> <p>2</p> <p>3 JOY LUEDTKE,</p> <p>4 a witness having been first duly sworn to tell the truth,</p> <p>5 the whole truth, and nothing but the truth, testified as</p> <p>6 follows:</p> <p>7 MR. CLARK: This is the time and place for the</p> <p>8 deposition of Joy Luedtke.</p> <p>9 It will be taken according to notice and</p> <p>10 conducted according to the Rules of Civil Procedure, the</p> <p>11 Idaho Rules of Civil Procedure, and we intend to use the</p> <p>12 deposition transcript for all purpose allowed by the</p> <p>13 Rules.</p> <p>14 EXAMINATION</p> <p>15 BY MR. CLARK:</p> <p>16 Q. Joy, would you say and spell your name for the</p> <p>17 court reporter, please.</p> <p>18 A. Joy Luedtke, J-o-y L-u-e-d-t-k-e.</p> <p>19 Q. Do you mind if I call you Joy?</p> <p>20 A. No. That would be fine.</p> <p>21 Q. Joy, we've met before. My name is Eric Clark,</p> <p>22 and I represent Mosell Equities in the case.</p> <p>23 And let's start out with just a few</p> <p>24 preliminaries.</p> <p>25 Have you ever had your deposition taken before?</p>
Page 3	Page 5
<p>1 EXAMINATION</p> <p>2</p> <p>3 JOY LUEDTKE PAGE</p> <p>4 By: Mr. Clark 4, 80</p> <p>5 By: Mr. Williams 72</p> <p>6 EXHIBITS</p> <p>7</p> <p>8 1 Berryhill &amp; Company, Balance Sheet 23</p> <p>9 2 Berryhill &amp; Company, Transactions 30</p> <p>10 by Account</p> <p>11 3 Berryhill &amp; Company, Transaction 42</p> <p>12 Detail By Account</p> <p>13 4 Berryhill &amp; Company, Register: 57</p> <p>14 Furniture and Fixtures</p> <p>15 5 E'mail to John Berryhill, from Glenn 61</p> <p>16 Mosell, dated 10-7-08</p> <p>17 6 Document by John Berryhill, Subject: 68</p> <p>18 Glenn Mosell and Polo Cove</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 A. No.</p> <p>2 Q. Okay. I'm just going to ask you some questions</p> <p>3 and solicit some responses, and then Mr. Berryhill's</p> <p>4 counsel will have an opportunity to ask you some</p> <p>5 questions as well.</p> <p>6 A. Okay.</p> <p>7 Q. It's not an inquisition by any means. If you</p> <p>8 need to take a break and get some coffee or go to the</p> <p>9 bathroom, please let me know and we'll accommodate you,</p> <p>10 whatever you need to do.</p> <p>11 Is there any reason that we should not proceed</p> <p>12 with your deposition today?</p> <p>13 And what I mean by that is, are you under any</p> <p>14 medication, or --</p> <p>15 A. No.</p> <p>16 Q. -- haven't slept for two weeks?</p> <p>17 A. No.</p> <p>18 Q. Or anything.</p> <p>19 A. No.</p> <p>20 Q. Okay.</p> <p>21 A. Uh-huh.</p> <p>22 Q. And then the other thing is, we have a court</p> <p>23 reporter who is taking down our conversation. So I will</p> <p>24 try to let you finish your answer before I begin a</p> <p>25 question.</p>

2 (Pages 2 to 5)

BURNHAM HABEL & ASSOCIATES, INC. (208) 345-5700

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DEPOSITION OF JOY LUEDTKE TAKEN 1-13-10

<p style="text-align: right;">Page 6</p> <p>1 A. Okay.</p> <p>2 Q. Which I will probably fail miserably at, but she</p> <p>3 will keep me in line.</p> <p>4 And I'll try to finish my question before I</p> <p>5 solicit the answer.</p> <p>6 A. Okay.</p> <p>7 Q. Okay. So that we make a clean transcript.</p> <p>8 Now, my understanding, Joy, is that you worked</p> <p>9 for Mr. Berryhill or his restaurant at some time; is that</p> <p>10 correct?</p> <p>11 A. Yes. I worked from October of 2007 to October</p> <p>12 of 2008.</p> <p>13 Q. What did you do?</p> <p>14 Well, let me first say, who did you work for?</p> <p>15 A. John Berryhill.</p> <p>16 Q. And does he have a restaurant?</p> <p>17 A. Yes, Berryhill &amp; Company.</p> <p>18 Q. Berryhill &amp; Company is a restaurant, but he also</p> <p>19 has an entity called Berryhill &amp; Company, Inc.; is that</p> <p>20 correct?</p> <p>21 A. I thought that was the same thing.</p> <p>22 Q. Okay.</p> <p>23 Okay. You worked for Mr. Berryhill. What did</p> <p>24 you do?</p> <p>25 A. I did his bookkeeping, I did his human</p>	<p style="text-align: right;">Page 8</p> <p>1 time he used communication through me to go to the rest</p> <p>2 of his staff, with the exception of a few employees that</p> <p>3 he was very close to.</p> <p>4 John took care of the kitchen and the kitchen</p> <p>5 staff, and I took care of the other responsibilities.</p> <p>6 Q. Okay. What other responsibilities would those</p> <p>7 be?</p> <p>8 A. Oh, the bookkeeping, tracking the daily sales,</p> <p>9 reconciling the accounts, paying the bills, giving</p> <p>10 employee reviews, hiring and firing staff.</p> <p>11 Q. And would you say your interaction occurred on a</p> <p>12 daily basis with Mr. Berryhill?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And who would you consider your boss?</p> <p>15 A. John.</p> <p>16 Q. And who would you consider to be the owner of</p> <p>17 the company?</p> <p>18 A. John.</p> <p>19 Q. And at any time while you were working for</p> <p>20 Mr. Berryhill, did anybody else represent to you that</p> <p>21 they had an ownership interest in Berryhill &amp; Company?</p> <p>22 A. No. My first week working there, John and Glenn</p> <p>23 both had a meeting with me and explained that they were</p> <p>24 going to be going into partnership together, that John</p> <p>25 was still my boss, but that Glenn was -- what Glenn told</p>
<p style="text-align: right;">Page 7</p> <p>1 resources, and then I helped with odds and ends, jobs in</p> <p>2 the kitchen that needed to be done. I helped with hiring</p> <p>3 and things like that.</p> <p>4 Q. I have heard the term general manager used.</p> <p>5 Would you consider yourself general manager?</p> <p>6 A. Yes. That was what was on my business card.</p> <p>7 Q. Was there a job description that you had by any</p> <p>8 chance?</p> <p>9 A. No.</p> <p>10 It started out originally as just a bookkeeper.</p> <p>11 And John was pleased with the job that I was doing, and</p> <p>12 he had a previous general manager, I can't remember his</p> <p>13 name now, and let him go within the first month of my</p> <p>14 working there, and then I took over his responsibilities</p> <p>15 as well.</p> <p>16 Q. Okay.</p> <p>17 And you mentioned some responsibilities a few</p> <p>18 minutes ago. Would those also apply to your general</p> <p>19 manager job?</p> <p>20 A. Yeah. I took on that title once -- was it Tim?</p> <p>21 I don't remember his name -- left.</p> <p>22 Q. Okay. And as a general manager, what type of</p> <p>23 interaction did you have with Mr. Berryhill on a daily,</p> <p>24 weekly, monthly basis?</p> <p>25 A. We were in constant communication. A lot of the</p>	<p style="text-align: right;">Page 9</p> <p>1 me was that John was kind of the vibrant chef</p> <p>2 personality, and for their partnership to continue to</p> <p>3 move forward, that John needed to be happy and that</p> <p>4 things at the restaurant needed to go well.</p> <p>5 Q. Okay. So you said a 50/50 partnership. Who</p> <p>6 represented that to you?</p> <p>7 MR. WILLIAMS: Object to the form.</p> <p>8 THE WITNESS: They didn't give me a percentage</p> <p>9 in that conversation. They both represented their</p> <p>10 partnership to me together in that meeting.</p> <p>11 Q. (BY MR. CLARK) Okay. With regard to your</p> <p>12 bookkeeping duties, what did that entail?</p> <p>13 A. Receiving all of the bills, entering them,</p> <p>14 paying all of the bills, working with all of our vendors,</p> <p>15 paying the employees, depositing checks, writing checks,</p> <p>16 things like that.</p> <p>17 Q. While you were there during October 2007 to</p> <p>18 2008, did anybody else perform those duties?</p> <p>19 A. Chris Munson. Within the first three months or</p> <p>20 so of me coming on staff, she was hired to help me with</p> <p>21 the bookkeeping responsibilities. So she did a lot of</p> <p>22 the data entry, and I still paid all of the bills, but</p> <p>23 she entered the bills.</p> <p>24 Q. Okay. But you reviewed her work?</p> <p>25 A. Yes.</p>

3 (Pages 6 to 9)

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<p style="text-align: right;">Page 10</p> <p>1 Q. Okay. Would you describe for me just briefly</p> <p>2 your experience as a bookkeeper, or?</p> <p>3 A. I started bookkeeping when I worked for a floral</p> <p>4 and gift basket company, and they handed me their books</p> <p>5 and asked me to start doing them. And so I began to do</p> <p>6 them. Basically learned as I went.</p> <p>7 My husband and I had a company of our own</p> <p>8 previously to that, and so I had done a lot of reading on</p> <p>9 how to track things and stuff as your own business. And</p> <p>10 so I relied on that research and started to do the</p> <p>11 bookkeeping and looked at QuickBooks for myself.</p> <p>12 Q. Is that the program you used at Berryhill?</p> <p>13 A. Yes.</p> <p>14 Q. Did you have any contact with or interaction</p> <p>15 with an accountant regarding the Berryhill moneys or</p> <p>16 accounts?</p> <p>17 A. Yes. There was a bookkeeper that was an advisor</p> <p>18 over me, and she reviewed my work and she came in</p> <p>19 originally once a week, and then she came in once a</p> <p>20 month, and then it was once a quarter. And then Amy</p> <p>21 Dempsey was the CPA that I dealt with for John's</p> <p>22 accounts.</p> <p>23 Q. Who was the advisor that worked over you --</p> <p>24 A. Toni, T-o-n-i, Himmelman.</p> <p>25 Q. -- with regard to that relationship with the</p>	<p style="text-align: right;">Page 12</p> <p>1 account and making sure that everything that had gone</p> <p>2 through was showing cleared, but we ran reports, profit</p> <p>3 and loss reports and balance sheets once a week. And at</p> <p>4 least once a month, those were given to John and</p> <p>5 sometimes to Glenn.</p> <p>6 Q. Any other reports?</p> <p>7 A. We also did inventory of the bar once a month.</p> <p>8 And we did inventory of the restaurant goods once a</p> <p>9 year.</p> <p>10 Q. With regard to financial reports, any other than</p> <p>11 profit and loss?</p> <p>12 A. Balance sheet. We did a balance sheet.</p> <p>13 Q. When did you create balance sheets, or create</p> <p>14 them?</p> <p>15 A. Every month for John.</p> <p>16 Q. Do you know who maintains those records?</p> <p>17 A. Now? Or then?</p> <p>18 Q. Both. If you can remember.</p> <p>19 A. I maintained them then. Christine Munson</p> <p>20 maintains them now. And they also have a CPA working for</p> <p>21 them now.</p> <p>22 Q. A different CPA?</p> <p>23 A. Jason Thompson.</p> <p>24 Well, I think Amy still does everything, but</p> <p>25 Jason comes in. He reconciles everything.</p>
<p style="text-align: right;">Page 11</p> <p>1 bookkeeping part, not the general manager part?</p> <p>2 A. Right; just the bookkeeping.</p> <p>3 Q. What financial records do you keep for the</p> <p>4 Berryhill &amp; Company business?</p> <p>5 A. What did I keep?</p> <p>6 Q. Yeah.</p> <p>7 A. We kept copies of all of the bills. We kept all</p> <p>8 of the daily sales receipts, all of the invoices that we</p> <p>9 sent out on our catering jobs.</p> <p>10 Q. Okay.</p> <p>11 A. And then all of the notes on all of the catering</p> <p>12 jobs we also kept.</p> <p>13 Q. Would that include money coming into the</p> <p>14 company?</p> <p>15 A. Yes.</p> <p>16 Q. Did you in your bookkeeping duties create any</p> <p>17 financial documents on a weekly, monthly, or yearly</p> <p>18 basis?</p> <p>19 A. Yes. All of those.</p> <p>20 Q. And what documents did you create on a daily</p> <p>21 basis?</p> <p>22 A. Do you mean reports?</p> <p>23 Q. Yeah. Reports, something like that.</p> <p>24 A. I don't think I -- I didn't necessarily run a</p> <p>25 report every day. I was always looking at the checking</p>	<p style="text-align: right;">Page 13</p> <p>1 Q. Who did you provide the balance sheet to every</p> <p>2 month?</p> <p>3 A. John.</p> <p>4 Q. Did he personally request those, or was that --</p> <p>5 A. That was just part of the review that we did</p> <p>6 with Toni. Those were. But he was always expecting</p> <p>7 them.</p> <p>8 Q. Did you have a monthly meeting, then, to go over</p> <p>9 the financials with Mr. Berryhill?</p> <p>10 A. Yes.</p> <p>11 Q. Was that a standard meeting?</p> <p>12 A. It just depended on whether or not he saw</p> <p>13 something that he wanted to go over or not. But usually</p> <p>14 there was questions that he had, so.</p> <p>15 Q. Was Mr. Mosell involved in any of these</p> <p>16 meetings?</p> <p>17 A. He was involved in the one in December of -- it</p> <p>18 was either December of 2007 or January of 2008. The</p> <p>19 construction for the remodel was coming to a close.</p> <p>20 There was \$100,000 in the checking account, and there was</p> <p>21 also approximately \$100,000 in bills due to the remodel.</p> <p>22 So John, Toni, Glenn, and I got together and looked at</p> <p>23 the balance sheet, looked at the bills and talked about</p> <p>24 where the money would go and how the two of them together</p> <p>25 felt it would be best spent.</p>

4 (Pages 10 to 13)

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<p style="text-align: right;">Page 14</p> <p>1 We also reviewed at that time how going forward 2 they would have the things that they took away from the 3 company be balanced. 4 So we created in the point of sales station, 5 whenever John's family or Glen's family came and ate at 6 the restaurant, all of that was tracked, and then that 7 was put into the books every day when the daily sales 8 went in. What was being taken away was recorded. 9 Q. And when you are talking about these take-aways, 10 that was for the Berryhills as well? 11 A. Yes. 12 Q. Did you keep that information? 13 A. Uh-huh. And that included Amy as well as John, 14 and Papa John. 15 Q. Do you recall if Mr. Mosell was involved in any 16 other of these monthly meetings other than in the 17 December or January time-frame? 18 A. I don't remember a formal one. There would be 19 different times where he would request reports. 20 One time I gave a report without John's 21 permission, and he asked me not to do that. 22 John wasn't trying to keep the information from 23 Glenn, but he preferred to know what was going out 24 when. 25 Q. Do you remember what report that you had</p>	<p style="text-align: right;">Page 16</p> <p>1 There was also going to be a spa that used the pressings 2 and things of the grapes, as far as for facial treatment. 3 So it would be a whole system that sort of 4 everything would feed each other, and the restaurant 5 would be another Berryhill. 6 Q. And in this master plan, how did you understand 7 the downtown restaurant was involved? 8 A. Well, John explained to me that again in order 9 for their partnership to move forward, that Glenn was 10 buying into Berryhill &amp; Company, and then Berryhill &amp; 11 Company would change, and then that whole thing together 12 would become MoBerry. 13 Q. Did you ever see any written projections that 14 Mr. Berryhill created? 15 A. No. No, that was a concern. 16 Q. Do you know what MoBerry was intended to do or 17 accomplish? 18 A. MoBerry was going to be -- my understanding was 19 it was going to be one of the partners among several that 20 were going to start the development in the Caldwell 21 area. 22 Q. Did you in 2007 or '08 or at any time while you 23 were working for Mr. Berryhill create income projections 24 for the restaurant? 25 A. I think we probably did. Toni and I probably</p>
<p style="text-align: right;">Page 15</p> <p>1 provided to Mr. Mosell? 2 A. Same I would provide to John, a profit and loss, 3 as well as a balance sheet. 4 Q. Do you remember when you had the conversation 5 with Mr. Berryhill? 6 A. No. We frequently had conversations regarding 7 their partnership and what the next plans were and how 8 that affected what we were doing right now. 9 When I first came on staff, the plan was that 10 within a year they would be ready to open the new 11 restaurant. And so my mentality was Berryhill downtown 12 needed to be running well enough that if John needed to 13 put his attention somewhere else, that it would continue 14 to run. 15 Q. How did those plans evolve? Did they change? 16 A. Oh, yeah. They changed frequently. 17 I don't think the big, the master plan changed 18 in terms of what they told me, but the timing of it 19 changed. 20 Q. Maybe if you'd elaborate a little more on what 21 was this master plan. 22 A. What was explained to me was that out in the 23 Caldwell area, there was going to be an equine center 24 that was going to include Albertson College. There was 25 going to be a hotel. There was going to be a restaurant.</p>	<p style="text-align: right;">Page 17</p> <p>1 did that together, but I don't remember specifically. 2 We were projecting. John and I had 3 conversations, and we were projecting that at the end of 4 2008, that it would have done \$2 million and that that 5 was doubling what they had done before. 6 Q. When did you have that conversation with 7 Mr. Berryhill? 8 A. I don't remember. 9 Q. Do you know if Mr. Berryhill provided the income 10 projections or had any conversations with Mr. Mosell 11 about these income projections? 12 A. No. I was very rarely in the meetings that the 13 two of them had together, so I don't know. 14 Q. Okay. While you were working for Mr. Berryhill, 15 did Berryhill &amp; Company apply for any loans? 16 A. Yes. 17 Q. Who were they with? 18 A. We got a loan for \$100,000 through Bank of the 19 Cascades. 20 It was a line of credit. 21 Q. Do you remember when the application was 22 processed? 23 A. Either at the very end of '07 or at the very 24 beginning of '08. 25 Q. Were you involved in preparing any financial</p>

5 (Pages 14 to 17)



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<p style="text-align: right;">Page 18</p> <p>1 documents?</p> <p>2 A. Yes. I did prepare.</p> <p>3 Q. Do you remember what those documents were?</p> <p>4 A. No.</p> <p>5 I think there might have been sales projections</p> <p>6 in that. It seems to me that there was that. And there</p> <p>7 were also the balance sheet and the profit and loss for</p> <p>8 the end of the year.</p> <p>9 I think we provided -- I think his name was</p> <p>10 Dave -- provided for him pretty much what we had provided</p> <p>11 to Amy Dempsey for our taxes.</p> <p>12 Q. Any other loans while you were working there?</p> <p>13 A. No. Not that we got.</p> <p>14 Q. Did you ever have any meeting with Mr. Mosell</p> <p>15 that Mr. Berryhill didn't participate in?</p> <p>16 A. No. We would have conversations, you know.</p> <p>17 Because he was often at the restaurant. But we never had</p> <p>18 an official meeting without John there.</p> <p>19 Q. Did you believe that Mr. Mosell at any time</p> <p>20 manipulated any of the financial records of Berryhill &amp;</p> <p>21 Company?</p> <p>22 A. No.</p> <p>23 MR. WILLIAMS: Object to the form.</p> <p>24 Q. (BY MR. CLARK) Did Mr. Mosell ever ask you to</p> <p>25 change or manipulate any financial records?</p>	<p style="text-align: right;">Page 20</p> <p>1 Who oversaw or reviewed the balance sheets?</p> <p>2 MR. WILLIAMS: Object to the form.</p> <p>3 MR. CLARK: Go ahead. You can answer.</p> <p>4 THE WITNESS: Oh, I don't know what he's saying.</p> <p>5 Go ahead?</p> <p>6 MR. CLARK: I'm sorry.</p> <p>7 Q. (BY MR. CLARK) There's been an allegation that</p> <p>8 Mr. Mosell was manipulating the bookkeeper at Berryhill &amp;</p> <p>9 Company and advising the bookkeeper to keep or to make</p> <p>10 changes to records, and I'm trying to establish whether</p> <p>11 or not that happened or not.</p> <p>12 MR. WILLIAMS: Object to form.</p> <p>13 THE WITNESS: No. That never happened. I never</p> <p>14 felt manipulated by Glenn to make any changes.</p> <p>15 And any time there were suggestions, any changes</p> <p>16 went through John first. I was very aware of who my boss</p> <p>17 was.</p> <p>18 Q. (BY MR. CLARK) And that was?</p> <p>19 A. John Berryhill.</p> <p>20 Q. Okay.</p> <p>21 MR. WILLIAMS: Ms. Luedtke, once in a while I</p> <p>22 make objections just for the record.</p> <p>23 THE WITNESS: Oh. Is that what you were saying?</p> <p>24 MR. CLARK: He's not just purposely being</p> <p>25 annoying.</p>
<p style="text-align: right;">Page 19</p> <p>1 A. The very first check that I saw Glenn give to</p> <p>2 Berryhill &amp; Company, I entered into the books as an</p> <p>3 equity account, because I was still so new with the</p> <p>4 business, I was under the impression that they were</p> <p>5 already partners.</p> <p>6 When Glenn saw the balance sheet and saw that it</p> <p>7 was in equity and wasn't in the loan account that was</p> <p>8 already established, he asked me to move that.</p> <p>9 So then I went to John and said, Glenn says it's</p> <p>10 a loan. It's not equity. He wants me to move it."</p> <p>11 And John said, "Okay."</p> <p>12 Q. Mr. Berryhill didn't dispute that?</p> <p>13 A. No. He didn't.</p> <p>14 Q. Okay.</p> <p>15 With regard to your meetings with Mr. Berryhill</p> <p>16 on a monthly basis, did Mr. Mosell at any time direct you</p> <p>17 to manipulate or change any figures on the balance sheets</p> <p>18 you were creating?</p> <p>19 A. No.</p> <p>20 Q. So who was directing you to provide that</p> <p>21 information?</p> <p>22 MR. WILLIAMS: Object to the form.</p> <p>23 THE WITNESS: Who?</p> <p>24 Q. (BY MR. CLARK) Well, who was overseeing, I</p> <p>25 guess, is a better question?</p>	<p style="text-align: right;">Page 21</p> <p>1 THE WITNESS: I thought you were saying to check</p> <p>2 the form.</p> <p>3 MR. WILLIAMS: It's objecting to the form of the</p> <p>4 question.</p> <p>5 And the court reporter types that down, and then</p> <p>6 we fuss about it later if we have to.</p> <p>7 THE WITNESS: Oh, okay.</p> <p>8 MR. WILLIAMS: So just ignore me.</p> <p>9 THE WITNESS: Oh, okay.</p> <p>10 Q. (BY MR. CLARK) If I understand correctly, there</p> <p>11 was some payments made from Mosell Equities kind of</p> <p>12 periodically while you were employed with</p> <p>13 Berryhill &amp; Company, and you talked about one check that</p> <p>14 you had received.</p> <p>15 A. Uh-huh.</p> <p>16 Q. Had you received any more or similar checks?</p> <p>17 A. There were several, at least three payments to</p> <p>18 Berryhill &amp; Company that I received and then applied to</p> <p>19 that loan account.</p> <p>20 Q. Okay. So you applied the money to the loan</p> <p>21 account?</p> <p>22 A. Uh-huh.</p> <p>23 Q. That went on the balance sheet, the monthly</p> <p>24 balance sheet?</p> <p>25 A. Yes.</p>

6 (Pages 18 to 21)

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<p style="text-align: right;">Page 22</p> <p>1 Q. In the --</p> <p>2 A. It was a long-term liability.</p> <p>3 Q. Long-term liability.</p> <p>4 And that was reviewed by Mr. Berryhill on a</p> <p>5 monthly basis?</p> <p>6 A. Yes.</p> <p>7 Q. Okay.</p> <p>8 A. It was also reviewed by the CPA. I went over</p> <p>9 and had a conversation with Amy Dempsey about how to</p> <p>10 track this loan.</p> <p>11 Q. Did you process any payments made to</p> <p>12 Mr. Berryhill for consulting services from Mr. Mosell or</p> <p>13 from Mosell Equities?</p> <p>14 A. No. Any check that was written specifically to</p> <p>15 John, he handled himself.</p> <p>16 Q. I also understand that Mosell Equities or</p> <p>17 somebody related to Polo Cove was renting some space,</p> <p>18 leasing some space at the Berryhill Restaurant site; is</p> <p>19 that correct?</p> <p>20 A. Well, that was the plan. That was the front of</p> <p>21 the remodel was going to be the showroom for selling of</p> <p>22 the properties out in the Caldwell area, and that never</p> <p>23 materialized.</p> <p>24 Q. Okay.</p> <p>25 A. And I know that he made rent payments for maybe</p>	<p style="text-align: right;">Page 24</p> <p>1 that's appears to be titled, "Balance sheet."</p> <p>2 Could you take a look at the document for me?</p> <p>3 A. Yes.</p> <p>4 Q. And could you identify that for me, if you</p> <p>5 could?</p> <p>6 A. Identify what?</p> <p>7 Q. Just generally what the document is.</p> <p>8 A. It's a balance sheet from Berryhill &amp; Company.</p> <p>9 Q. And there's a date on it?</p> <p>10 A. June 30th, 2008.</p> <p>11 Q. And based on your testimony, there should be one</p> <p>12 for every month?</p> <p>13 A. Yes.</p> <p>14 Q. Okay.</p> <p>15 And this one, or up in the left-hand corner, it</p> <p>16 has a date as well.</p> <p>17 A. July 1st, 2008.</p> <p>18 Q. So does that mean when the document was</p> <p>19 printed?</p> <p>20 A. Yes. That's when the report was ran.</p> <p>21 Q. Okay.</p> <p>22 And you've covered some of my questions</p> <p>23 previously while we've been discussing this, but I have a</p> <p>24 couple of specific questions with regard to this</p> <p>25 document.</p>
<p style="text-align: right;">Page 23</p> <p>1 three months and then was just not in a situation where</p> <p>2 he could continue to do that, and Berryhill &amp; Company</p> <p>3 started making the entire rent payment.</p> <p>4 Q. And you say he couldn't make the payments?</p> <p>5 A. Glenn.</p> <p>6 Q. Okay.</p> <p>7 And how did you account for those rent payments?</p> <p>8 A. He was billed as, like, a sublesser, and we</p> <p>9 invoiced him every month.</p> <p>10 Q. And --</p> <p>11 A. That was completely separate from the loan in</p> <p>12 the books. He was a customer.</p> <p>13 Q. But I guess what I'm saying is, how did you</p> <p>14 account for the income from the payments from Mosell</p> <p>15 Equities on the balance sheet?</p> <p>16 A. I accounted it as rent.</p> <p>17 Q. Do you know if there was a separate written</p> <p>18 lease or sublease, do you know, regarding that space?</p> <p>19 A. I know that they talked a lot about it, but I</p> <p>20 don't think that anything was ever put in writing.</p> <p>21 MR. CLARK: And I can make a copy for</p> <p>22 Mr. Berryhill, if you'd like.</p> <p>23 MR. WILLIAMS: That's okay.</p> <p>24 (Exhibit 1 was marked for identification.)</p> <p>25 Q. (BY MR. CLARK) Joy, I've handed you a document</p>	<p style="text-align: right;">Page 25</p> <p>1 There's under Liabilities &amp; Equity, there's</p> <p>2 about three quarters of the way down the page, there's a</p> <p>3 statement, "BHC Giftcards, \$21,574.47."</p> <p>4 What are those?</p> <p>5 A. Berryhill &amp; Company gift certificates.</p> <p>6 Q. And how are those accounted for?</p> <p>7 A. Those are -- we paid a monthly fee through our</p> <p>8 Aloha system to track those. So when we moved over from</p> <p>9 the old location to the new one, all of the old gift</p> <p>10 cards were converted to the new.</p> <p>11 And then those were reconciled every month based</p> <p>12 on what had sold according to reports that I ran off of</p> <p>13 the Aloha system.</p> <p>14 Q. So I guess what I'm asking is, this figure, does</p> <p>15 that show an outstanding number of gift cards?</p> <p>16 A. Yes. Those are gift cards that have been</p> <p>17 purchased.</p> <p>18 Q. That haven't been redeemed?</p> <p>19 A. Correct.</p> <p>20 Q. And are they all purchased, or can they be given</p> <p>21 away?</p> <p>22 A. They can be given away.</p> <p>23 Q. So this figure doesn't reflect --</p> <p>24 A. It's not necessarily sales. Some of them are</p> <p>25 donations or things like that.</p>

7 (Pages 22 to 25)

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<p style="text-align: right;">Page 26</p> <p>1 Q. Okay.</p> <p>2 And working down to Long-term Liabilities,</p> <p>3 there's, "Mosell Equities, LLC, \$385,000"?</p> <p>4 A. Uh-huh.</p> <p>5 Q. At that point, was that the total amount that</p> <p>6 Mosell Equities had provided?</p> <p>7 A. Yes, up to that point.</p> <p>8 Q. Do you recall if there was another \$20,000</p> <p>9 deposited?</p> <p>10 A. Yes. There was.</p> <p>11 Q. Okay. Moving down, under equity, there's,</p> <p>12 "Mosell Equity, \$20,000"?</p> <p>13 A. Uh-huh.</p> <p>14 Q. What's that accounting for?</p> <p>15 A. I do not know.</p> <p>16 Q. Was there another check by any chance?</p> <p>17 A. Could have been, but I wouldn't have put it</p> <p>18 there, so.</p> <p>19 If it's there, then it was a check from Glenn,</p> <p>20 but I don't remember receiving that or putting that in</p> <p>21 the account.</p> <p>22 Q. And there was another, if my memory serves me,</p> <p>23 it might have been before your time, but there was</p> <p>24 another two \$10,000 checks that were paid into the</p> <p>25 general account from Mosell Equities.</p>	<p style="text-align: right;">Page 28</p> <p>1 account?</p> <p>2 A. No.</p> <p>3 And he never asked to be.</p> <p>4 Q. And Mr. Berryhill didn't direct you to make</p> <p>5 Mr. Mosell one?</p> <p>6 A. No.</p> <p>7 Q. Okay. Moving down, there's an, "Owner's Draw,</p> <p>8 -\$5,089.81."</p> <p>9 A. Uh-huh.</p> <p>10 Q. What does that address?</p> <p>11 A. Those would have been things that the company</p> <p>12 paid for that were expenses of John's.</p> <p>13 Q. So it's not Mosell Equities and Berryhill. It's</p> <p>14 Berryhill?</p> <p>15 A. Right.</p> <p>16 Q. Only?</p> <p>17 A. Right.</p> <p>18 Q. How do you originally account for the money that</p> <p>19 Mosell Equities had deposited, the first check you talked</p> <p>20 about earlier?</p> <p>21 MR. WILLIAMS: Object to the form.</p> <p>22 THE WITNESS: When I originally received the</p> <p>23 check from Mosell Equities, I put it into an equity</p> <p>24 account, and then Glenn asked me to move the check to the</p> <p>25 long-term liability.</p>
<p style="text-align: right;">Page 27</p> <p>1 Do you recall?</p> <p>2 A. Well, if it's paid into the general account, it</p> <p>3 has to be accounted for in some way.</p> <p>4 Q. If it was paid -- I guess let me ask the</p> <p>5 question.</p> <p>6 If it was paid into the general account, how</p> <p>7 would it appear on a balance sheet?</p> <p>8 A. Everything that was paid into the general</p> <p>9 account was accounted for as a long-term liability for</p> <p>10 Mosell Equities, that I remember. That's how I would</p> <p>11 have received the money. In all of of the money that</p> <p>12 Glenn gave while I was there, it went into the regular</p> <p>13 checking account.</p> <p>14 Q. But it was accounted for as long-term --</p> <p>15 A. Yes.</p> <p>16 Q. -- liabilities?</p> <p>17 A. Yes.</p> <p>18 Q. When you say regular checking account, what was</p> <p>19 that, the name on the account? Was it Berryhill &amp;</p> <p>20 Company?</p> <p>21 A. Yes. And then John Berryhill's name was</p> <p>22 underneath that.</p> <p>23 Q. Who were the signatores on that account?</p> <p>24 A. At this time, it was John and myself.</p> <p>25 Q. Was Mr. Mosell ever a signatore on that</p>	<p style="text-align: right;">Page 29</p> <p>1 I checked with John, and then I did that.</p> <p>2 Q. (BY MR. CLARK) Okay. Is the accounting term</p> <p>3 paid in capital or capital contribution, is that what you</p> <p>4 believed the original check was for?</p> <p>5 MR. WILLIAMS: Object to the form. Foundation.</p> <p>6 THE WITNESS: They didn't really say either one</p> <p>7 way or the other, but because they were talking about</p> <p>8 being partners, that was my assumption.</p> <p>9 Q. (BY MR. CLARK) Okay. Was there a separate</p> <p>10 document and explanation of retained earnings, or</p> <p>11 retained earnings report?</p> <p>12 A. Can you ask it to me another way? What do you</p> <p>13 mean, that I provided it to someone, or?</p> <p>14 Q. Well, first of all, was one created?</p> <p>15 Sometimes in these accounting documents, there</p> <p>16 are tangential reports created to elaborate on certain</p> <p>17 entries.</p> <p>18 A. Yeah. I could do, you know, a quick report on</p> <p>19 any one of these, but I don't remember anyone ever asking</p> <p>20 me to do that.</p> <p>21 Q. Okay. But if there was a quick report done on,</p> <p>22 say, owner's draws or retained earnings, it would</p> <p>23 elaborate?</p> <p>24 A. Correct. You could double click on that, and it</p> <p>25 would show you everything it was talking about.</p>

8 (Pages 26 to 29)

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<p style="text-align: right;">Page 30</p> <p>1 Q. And again, you used QuickBooks?</p> <p>2 A. Yes.</p> <p>3 Q. Okay.</p> <p>4 (Exhibit 2 was marked for identification.) Mark</p> <p>5 Q. (BY MR. CLARK) I've handed you a document</p> <p>6 that's titled, "Transactions By Account." Have you ever</p> <p>7 seen this document before?</p> <p>8 A. I've looked at it before in QuickBooks, but I</p> <p>9 don't know that I ever printed it.</p> <p>10 Q. Okay. And this is a hard copy depiction of a</p> <p>11 screen from QuickBooks; is that correct?</p> <p>12 A. Yes.</p> <p>13 Q. Okay.</p> <p>14 Do you remember if -- well, strike that. Strike</p> <p>15 that question.</p> <p>16 Let me ask you a couple of questions. It says,</p> <p>17 "Transactions By Account." What account is this</p> <p>18 information referencing?</p> <p>19 A. This is representing the Mosell Equities</p> <p>20 long-term liability account.</p> <p>21 Q. Moving across the page, right under the heading,</p> <p>22 it says, "All Transactions," and then it says, "Memo."</p> <p>23 There's some notations there --</p> <p>24 A. Uh-huh.</p> <p>25 Q. -- for each individual entry.</p>	<p style="text-align: right;">Page 32</p> <p>1 John to Glenn -- or, "To John from Glenn?</p> <p>2 A. Uh-huh.</p> <p>3 Q. Was that money processed through Berryhill &amp;</p> <p>4 Company, or did it go directly to Mr. Berryhill?</p> <p>5 A. I don't remember.</p> <p>6 Q. How would I find out from an accounting review</p> <p>7 where that money went?</p> <p>8 MR. WILLIAMS: Object to the form.</p> <p>9 THE WITNESS: This went into the general</p> <p>10 checking account, so there was never a large draw. You</p> <p>11 would have to look under John's equity account to see if</p> <p>12 there had been a large check written to him for that</p> <p>13 amount.</p> <p>14 Q. (BY MR. CLARK) So going back to the balance</p> <p>15 sheet, if you clicked on owner's equity --</p> <p>16 A. Yes.</p> <p>17 Q. -- or the equity account, then that would</p> <p>18 generate that?</p> <p>19 A. Uh-huh.</p> <p>20 Q. Okay.</p> <p>21 A. For Berryhill equity.</p> <p>22 Q. Regarding this check to John from Glenn, working</p> <p>23 to the left, it says transfer rather than deposit. Do</p> <p>24 you know why it says that?</p> <p>25 A. Yeah, because it would have been movement of</p>
<p style="text-align: right;">Page 31</p> <p>1 Who put that information into QuickBooks?</p> <p>2 A. I did after I had started. Before me it would</p> <p>3 have been Mary, his previous bookkeeper.</p> <p>4 Q. So you would be involved in, say, from 10-9-2007</p> <p>5 forward?</p> <p>6 A. Yes.</p> <p>7 Q. Okay.</p> <p>8 And it says, "Deposits," and then, "General</p> <p>9 Journal." Was this a distinction?</p> <p>10 A. Yes. I mean, it's a different process. A</p> <p>11 deposit would have been just going to the make deposit</p> <p>12 screen and receiving the money directly. And depositing</p> <p>13 a general journal is actually a separate type of entry</p> <p>14 where you balance it between two different accounts. So</p> <p>15 you are taking something directly out of somewhere and</p> <p>16 putting it somewhere else.</p> <p>17 Q. Okay. Then I guess my question is, was there a</p> <p>18 distinction between listed as deposit versus general</p> <p>19 journal?</p> <p>20 A. Is there a distinction between? It accomplishes</p> <p>21 the same thing.</p> <p>22 Q. Okay. Okay. That's what I was getting at.</p> <p>23 A. Yeah.</p> <p>24 Q. Okay. Let me go down to under the memos,</p> <p>25 there's an annotation on 12-28-07. It says, "Check from</p>	<p style="text-align: right;">Page 33</p> <p>1 money from one balance sheet account to another balance</p> <p>2 sheet account. And so that's why it's called a</p> <p>3 transfer.</p> <p>4 Q. But was it money already in the general account</p> <p>5 that was being moved?</p> <p>6 A. It would have been a check received into the</p> <p>7 checking account that was then moved to another</p> <p>8 balance.</p> <p>9 Q. And that's what I'm asking you. Where did</p> <p>10 that --</p> <p>11 A. I don't remember.</p> <p>12 You know, that check is for \$50,000, and the</p> <p>13 Berryhill equity is a negative \$50,000. It's possible</p> <p>14 that you could make some deductions there, but I don't</p> <p>15 remember specifically.</p> <p>16 Q. Well, the Berryhill equity accounts, going back</p> <p>17 to No. 1, it says, "Berryhill Equity - \$50,000."</p> <p>18 A. Right.</p> <p>19 Q. So what can I deduce from that entry? Where did</p> <p>20 that money go?</p> <p>21 MR. WILLIAMS: Object to the form.</p> <p>22 THE WITNESS: You can deduce from that just</p> <p>23 logically that John took that money out of the account,</p> <p>24 but it's not something that I remember happening.</p> <p>25 MR. CLARK: Okay.</p>

9 (Pages 30 to 33)

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<p style="text-align: right;">Page 34</p> <p>1 Q. (BY MR. CLARK) And you said potentially John 2 could have taken the money out of the account. 3 How would that have been accounted for if that 4 occurred? Would there have been a check or a withdrawal? 5 A. It would have been a check. 6 I mean, he got all of his checks from me, so if 7 that's what it is, then I'm the one that did it. But I 8 just don't remember. 9 Q. Okay. 10 But again, if we opened up QuickBooks and 11 clicked on check to John from Glenn, would there be a 12 deposit summary or some other type of summary of what 13 happened? 14 Or I'll let you answer. 15 A. I would have tracked the check number. And so 16 there is a way to find it, but I would just have to get 17 in there and look. 18 Q. Okay. 19 And conversely, going back to the balance sheet, 20 if you clicked on Berryhill equity, would there be some 21 type of report or location of where that money came from 22 or where did it go? 23 A. Yes. 24 Q. Okay. I have a general idea, but I'm going to 25 ask you specifically with regard to the move downtown.</p>	<p style="text-align: right;">Page 36</p> <p>1 anticipated, and so when I came on in October, all of 2 those conversations happened before I got there, but 3 there wasn't any pointing fingers at that point. 4 Q. (BY MR. CLARK) Did you ever hear Mr. Berryhill 5 blame Mr. Mosell for the move downtown? 6 MR. WILLIAMS: Object to the form. 7 THE WITNESS: I seem to remember him saying that 8 it was his idea to do it. 9 It was a suggestion. And that they talked a lot 10 about it, but they both, they were very close partners at 11 that point. 12 Q. So based on your understanding, it was a mutual 13 decision? 14 MR. WILLIAMS: Object to the form. 15 THE WITNESS: Yes. 16 Q. (BY MR. CLARK) Okay. Let's talk about 17 Mr. Mosell's and Mr. Berryhill's relationship 18 regarding -- well, what you know about that. 19 Was Mr. Mosell ever involved -- do you want some 20 more coffee? 21 A. No. I'm okay. 22 Q. I'll stop if you want. 23 A. Okay. 24 Q. Was Mr. Mosell involved in the day-to-day 25 operation of the restaurant?</p>
<p style="text-align: right;">Page 35</p> <p>1 Were you involved? Were you an employee after the move 2 from Broadway had occurred to downtown? 3 A. The restaurant was working at two locations at 4 that point, and our sous chef, Al, was running the 5 kitchen at the Broadway location, and Grady was running 6 the kitchen at the downtown location. 7 The original plan was to make that a smaller, 8 less formal type of restaurant, but we began to see that 9 the communication, working at two different locations, 10 was just not going well. So we made the decision to 11 sublease that space and move everyone downtown. 12 At that point, we took over the space in the 13 basement, and we extended our rent. 14 Q. Do you know if Mr. Mosell was involved in that 15 decision? 16 A. Yes. I believe that he was. But not in front 17 of me. 18 Q. Okay. 19 Do you understand or believe that Mr. Mosell 20 either insisted on or was driving the move from the 21 Broadway location downtown? 22 MR. WILLIAMS: Object to the form. 23 THE WITNESS: I sensed a lot of excitement from 24 both of them. Because at that point, the move downtown, 25 the restaurant was much, much busier than anyone had</p>	<p style="text-align: right;">Page 37</p> <p>1 MR. WILLIAMS: Object to the form. 2 THE WITNESS: No. 3 But he came to have lunch, and he was often 4 watching how things were going. He ate there 5 frequently. 6 Q. (BY MR. CLARK) What do you know about -- I 7 think you mentioned the term buy-in. What do you know 8 about a buy-in by Mosell Equities or Mr. Mosell at the 9 Berryhill &amp; Company Restaurant or business? 10 MR. WILLIAMS: Object to the form. 11 THE WITNESS: Um, what John told me was that 12 there was money that Glenn was giving him personally, as 13 well as money that was specifically for the restaurant, 14 and that both of those together were part of the buy-in, 15 but I don't remember what the amounts were supposed to 16 be. 17 Q. (BY MR. CLARK) Do you understand that the 18 285,000, or whatever that is, accounted -- 19 A. \$385,000. 20 Q. The 385. Excuse me. 21 That was buy-in money? 22 A. It wasn't all of it, but he was making 23 payments. 24 Q. Okay. 25 Do you ever know what the buy-in amount was?</p>

10 (Pages 34 to 37)

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<p style="text-align: right;">Page 38</p> <p>1 A. He told me. I know it was over \$400,000, but I 2 don't remember exactly how much it was. 3 Q. When you say "he," who are you talking about? 4 A. John told me. 5 Q. Okay. 6 Was it over \$400,000? 7 A. Yes. 8 Q. If you recall, when did you have that 9 conversation with Mr. Berryhill? 10 A. I don't remember when. We had frequent 11 conversations about these issues, so. 12 Q. Okay. 13 A. I don't remember specifically when. 14 Q. When you say, "these issues," what are you 15 referring to? 16 A. Well, the partnership and the developments. 17 You know, there was a lot of excitement and 18 enthusiasm, and we were always planning and, you know, 19 trying to improve. 20 And so, you know, we talked about it a lot, and 21 I gave the partnership and the moneys and all of those 22 things a lot of attention, because I knew that there was 23 a lot at stake. 24 So I was always asking questions. Whenever 25 there was confusion, I was always asking questions.</p>	<p style="text-align: right;">Page 40</p> <p>1 had taken more out of the company than the other person, 2 then they would settle it. 3 So when they went into the partnership in 2008, 4 that everything would be equal. 5 Q. Okay. When you say there was a discussion that 6 you would wait until 2008 and that for tax purposes for 7 2007 it would stay a loan, is that it? 8 A. Yeah, because once the partnership was 9 finalized, then that loan was going to be rolled over 10 into equity. 11 Q. Okay. Who told you that the decision was to 12 keep it as a loan? 13 A. I believe it was a question that I asked John. 14 "So, we are leaving it as a loan for tax purposes?" 15 And I believe he said yes. 16 Q. Okay. And did that happen? 17 A. Yes. It did. That's how it went to the 18 accountant. 19 Q. And I understand you left in the latter part of 20 2008, in October of '08? 21 A. Uh-huh. 22 Q. So you weren't involved in the tax preparation 23 for 2008? 24 A. No. I was not. 25 Q. Okay. While you were working at Berryhill up</p>
<p style="text-align: right;">Page 39</p> <p>1 Q. Give me an example of a question that you would 2 ask or a confusion that you would have. 3 A. For example, in December of 2007, both Toni and 4 I went to John and said, "Okay. It's tax time. You 5 know, these moneys have all been received this year. You 6 know, there's nothing in writing." So we said, "You guys 7 need to go talk to a lawyer. You need to talk to your 8 accountant to make sure." 9 Because at that point we didn't know if we were 10 going to try to do it in 2007 before taxes went out or 11 wait and do it in 2008. 12 So John and Glenn went and met with Victoria 13 Meyer. They met with her separately. They met with Amy 14 Dempsey separately. And I think they even had a meeting 15 where they all got together. And they decided it was 16 going to be best to wait to finalize the partnership 17 until 2008. 18 So it was agreed that it was going to stay a 19 loan until all of that could be materialized, but I think 20 one of the outcomes of that conversation was making sure 21 that what -- you know, like I mentioned, what was being 22 taken from the restaurant in terms of bonuses, that 23 everything through 2008 was tracked equally, so that when 24 they went to make their partnership at the end of 2008, 25 that was when they said they would settle it. If someone</p>	<p style="text-align: right;">Page 41</p> <p>1 until October of '08, do you have an understanding or 2 belief that the Mosell long-term liabilities had been 3 transitioned to an equity position at all? 4 A. No. It had not. 5 Q. At least you hadn't accounted for it on the 6 books? 7 A. Correct. 8 Q. Okay. Did Mr. Berryhill ever tell you up until 9 that time that the buy-in had occurred or the change in 10 the accounting? 11 A. No. No, he told me that it wasn't finished and 12 that there was still money that was due. 13 So the buy-in was never finalized while I was 14 there. 15 Q. Did he tell you how much money he thought was 16 due? 17 A. He did, but I don't remember what it was. 18 Q. Do you know if that was ever communicated via 19 e-mail? 20 A. To me, or? 21 Q. Yeah, or in writing. 22 A. No. No, John and my conversations were almost 23 always face-to-face, so I know that he and Glenn e'mailed 24 back and forth a lot about that. 25 Q. Okay. There was a discussion in the latter part</p>

11 (Pages 38 to 41)

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<p style="text-align: right;">Page 42</p> <p>1 of 2007 about accounting for the business, and I can't 2 remember exactly what you said, but with regard to, like, 3 comps and dinners and stuff. 4 You would account for that? 5 A. Uh-huh. 6 Q. We talked about, and I've got an exhibit for you 7 in a minute, but what other things were addressed other 8 than just, say, lunches or dinners? 9 A. That was it, specifically, in that conversation. 10 Because that was something that they were both doing that 11 were being taken out of the company. 12 (Exhibit 3 was marked for identification.) 13 Q. (BY MR. CLARK) Joy, you've been handed a 14 document called, "Transaction Detail By Account." 15 A. Uh-huh. 16 Q. Have you ever seen that document before? 17 A. Not this one specifically, but this is the 18 accounting of the restaurant comps that I was speaking 19 about. 20 Q. Okay. 21 Now, it says January 1, '06 through November 22 24th, '09. 23 A. Uh-huh. 24 Q. All of these entries appear to be in '08. Do 25 you remember if there was any made in '07 or '06?</p>	<p style="text-align: right;">Page 44</p> <p>1 Q. And those were created because the partners 2 wanted to track each other's comps? 3 A. Yes. 4 Q. Hold on a second. There's been a claim that 5 potential investors and other interested parties were 6 wined and dined by Mr. Mosell at the restaurant without 7 charge. 8 If Mr. Mosell brought somebody to the 9 restaurant, it would be accounted for in this? 10 A. Yes. 11 Q. Okay. 12 A. Because everything had to be rung up in the 13 register in order for the food to be prepared in the 14 kitchen. And so to empty the ticket, to close out the 15 ticket, I created comp. buttons. There was a Mosell 16 button, and there was a Berryhill button. 17 So every time that either one of them were at 18 the table -- and sometimes they ate together, and then it 19 would go to one person or the other, but that was how 20 that was handled. 21 Q. If Mr. Mosell brought a potential investor in 22 the Polo Cove project in, was there a special annotation 23 in the comps? 24 A. No, because there was no way for us in the 25 basement to know who he was wining and dining. It's just</p>
<p style="text-align: right;">Page 43</p> <p>1 A. No. We didn't start tracking it this way until 2 2008. 3 Q. Okay. 4 And it says there's a sales account. Was there 5 a sales account in QuickBooks? 6 A. Yes. 7 Q. And then under sales, there's a Glenn and Mickie 8 account? 9 A. Yes. 10 Q. And Glenn and Mickie are Glenn Mosell and Mickie 11 Mosell? 12 A. Yes. 13 Q. Okay. 14 And is there a similar account for John and Amy 15 Berryhill? 16 A. Yes. 17 Q. Do you recall -- well, let me ask you. 18 With regard to creating these accounts, did you 19 create the accounts? 20 A. Yes. 21 Q. And you did so at Mr. Berryhill's direction? 22 A. Yes. 23 Q. And like I said, there's also an account for 24 Mr. Berryhill and Mr. and Mrs. Berryhill? 25 A. Yes.</p>	<p style="text-align: right;">Page 45</p> <p>1 too busy, too big. 2 Q. So you can't tell looking at this report whether 3 it was an investor or he was having a sandwich by 4 himself, or? 5 A. Correct. 6 Q. We've been going about an hour. You want to 7 take a break, or are you okay? 8 A. How much longer are you going to be until I go 9 to the next person? Are you about halfway? 10 MR. CLARK: Yeah probably. Maybe a little 11 farther. 12 THE WITNESS: Yeah. Then let's break. 13 MR. CLARK: Is that okay? 14 MR. WILLIAMS: Sure. 15 (Brief recess was taken.) 16 CONTINUED EXAMINATION 17 BY MR. CLARK: 18 Q. If I could get you to look at Exhibit No. 3, 19 again, Joy. Do you remember off the top of your head 20 when you left in October of '08 what the balance for John 21 and Amy's account was? 22 A. I don't remember. 23 Q. Don't remember? Okay. 24 We talked a little bit about Polo Cove earlier. 25 With regard to Polo Cove, what was your</p>

12 (Pages 42 to 45)

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<p style="text-align: right;">Page 46</p> <p>1 understanding of how the downtown restaurant fit into 2 that project?</p> <p>3 MR. WILLIAMS: Object to the form.</p> <p>4 THE WITNESS: My understanding was that the 5 downtown project would become a part of the MoBerry 6 partnership when it was finalized.</p> <p>7 Is that what you were asking?</p> <p>8 MR. CLARK: Well, yeah.</p> <p>9 Q. (BY MR. CLARK) And the MoBerry partnership, 10 what was your understanding of what the MoBerry 11 partnership would be involved in?</p> <p>12 MR. WILLIAMS: Object to the form.</p> <p>13 THE WITNESS: They would own the restaurant 14 downtown, and then they would also own, be partners in 15 the new development with other people.</p> <p>16 So it was Berryhill, and then it was going to be 17 other things as well.</p> <p>18 Q. (BY MR. CLARK) Okay. And you said the "new 19 development." Would that be the Polo Cove development or 20 others?</p> <p>21 A. The Polo Cove development was all that I 22 remember.</p> <p>23 Q. Okay. And where did you derive this 24 understanding from? Was it from Mr. Mosell? Was it from 25 Mr. Berryhill, or was it from both of them?</p>	<p style="text-align: right;">Page 48</p> <p>1 Q. Were you aware that any money paid in by the 2 Mosells or Mosell Equities that was accounted for as a 3 long-term liability ever went to pay any bills from the 4 Polo Cove project?</p> <p>5 MR. WILLIAMS: Object to the form.</p> <p>6 THE WITNESS: Part of that \$100,000 that was 7 given the end of October, Polo Cove was responsible for 8 part of the bills for remodeling what is now the catering 9 room. And so money was spent to pay the contractors for 10 both spaces from that \$100,000.</p> <p>11 I remember we had approximately \$100,000 in 12 bills, and that was when that money at that point went 13 to, was to pay off for the tenant improvements.</p> <p>14 Q. For the entire project?</p> <p>15 A. For the final.</p> <p>16 It was done in two phases.</p> <p>17 Q. Okay.</p> <p>18 A. And you know, you see here in October, "Loan 19 TIs." That was to help -- back in August, that was for 20 the first phase. That got us ready.</p> <p>21 Basically, we had walls up, and it was temporary 22 enough that we could do things for Christmas. And then 23 after Christmas, the final, you know, tenant improvements 24 were finished, and then we paid them in full with that 25 money.</p>
<p style="text-align: right;">Page 47</p> <p>1 A. I asked John a lot of questions, because I was 2 trying to understand how it was all working together, how 3 it was going to evolve so that I could be sure to track 4 that accurately. So that was the understanding that I 5 had from John.</p> <p>6 Q. Okay. And to elaborate on your response, what 7 concerns or what questions did you have?</p> <p>8 A. I wanted to be sure to be tracking, you know, 9 the moneys that were received accurately.</p> <p>10 My concern also was just in so that I, as people 11 were coming and going, you know, there were people that 12 were coming into the restaurant and, you know, plans were 13 being made, that I was somewhat abreast of what was 14 happening.</p> <p>15 Q. Regarding the money indicated on Exhibit 1 under 16 Mosell Equities \$385,000, where did that go? I think 17 your testimony was that went into the general account?</p> <p>18 A. Yes, into the checking account.</p> <p>19 Q. And from that account -- well, let me ask you. 20 In QuickBooks, did you ever set up any type of 21 account specifically for Polo Cove or that development?</p> <p>22 A. No.</p> <p>23 Q. You say you were concerned about tracking money 24 received and accounting for that money.</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 49</p> <p>1 Q. Was it just an office for the Polo Cove space?</p> <p>2 A. Well, it was going to be the showroom, so the 3 first third, approximately, of that, what used to be the 4 furniture store, the storefront where all of the glass 5 windows were, that was going to be an office showroom for 6 Polo Cove.</p> <p>7 Q. Okay.</p> <p>8 But other than the TI build-out for the Polo 9 Cove space at the Berryhill site --</p> <p>10 A. Uh-huh.</p> <p>11 Q. -- were you aware of any of the Mosell Equities' 12 money being used to acquire land in Caldwell, pay bills 13 from the Caldwell project, anything like that?</p> <p>14 MR. WILLIAMS: Object to the form.</p> <p>15 THE WITNESS: I mean, no.</p> <p>16 As Glenn gave money into the general account, 17 there was always a need for it immediately with the 18 expenses that the restaurant had incurred.</p> <p>19 And so, you know, that money went out to pay for 20 things as soon as they came in.</p> <p>21 Q. (BY MR. CLARK) And those things that you were 22 alluding to were related to the restaurant downtown?</p> <p>23 A. Yes.</p> <p>24 Q. So let me see if I can rephrase this.</p> <p>25 Are you aware of any payments coming from</p>

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<p style="text-align: right;">Page 50</p> <p>1 Berryhill &amp; Company for expenses incurred for the Polo 2 Cove project? 3 A. No. 4 MR. WILLIAMS: Object to the form. 5 THE WITNESS: No. Not aware of any. 6 MR. CLARK: Okay. 7 Q. (BY MR. CLARK) I know you were involved in the 8 2007 taxes of Berryhill. Were there any deductions or 9 Schedule C, Schedule K's, anything like that that 10 Berryhill received from the Polo Cove project? 11 MR. WILLIAMS: Object to the form. 12 THE WITNESS: No. 13 Or not that came through me. They might have 14 gone directly to Amy Dempsey, but I never saw any. 15 Q. (BY MR. CLARK) Did you review the final 2007 16 tax form? 17 A. No. I did not. 18 Q. Okay. 19 A. Other than she gave me, oh, I don't know the 20 word, basically the addendums to the balance sheet, 21 things that they wanted me to move around, and that's 22 what I reviewed. 23 Q. Did you ever hear Mr. Berryhill discuss or 24 communicate to you what his involvement in the Polo Cove 25 project was?</p>	<p style="text-align: right;">Page 52</p> <p>1 Q. Did Mr. Berryhill have a separate consulting 2 business? 3 A. Yes. 4 Q. What was that called? 5 A. I think it was just called John Berryhill, but I 6 never saw anything. 7 Q. That was accounted separately? 8 A. That was just accounted for personally. 9 Q. Okay. 10 Do you have any idea who the other partners 11 Mr. Berryhill referred to with regard to the Berryhill 12 project were? 13 A. I met them. They would often come to eat 14 together and meet at Berryhill &amp; Company, but I don't 15 remember their names anymore. 16 Q. And if these folks came and met there and ate, 17 whose tab did it go on? 18 A. I'm not sure. I think, you know, it just 19 depended. I think they sometimes shared it. 20 But again, I wasn't the one ringing them up and 21 checking it out. So usually either John or Glenn would 22 let the waitress know, "Put it on my tab." 23 Q. Okay. 24 Did you ever hear anyone say that Mr. Mosell was 25 going to be the money man and that Mr. Berryhill would be</p>
<p style="text-align: right;">Page 51</p> <p>1 A. He was the restaurant developer and the 2 consultant. Where it had to do with catering, he was, 3 you know, they were going to get, you know, the other 4 part of us were going to get people to the new 5 development, the other partners, and he would make sure 6 of the hospitality and those things for the people while 7 they were there was taken care of. 8 Q. When you say the other partners, did 9 Mr. Berryhill refer to the other people as partners? 10 A. He referred that they were all part of Polo 11 Cove, you know, that, his partners in Polo Cove. 12 Q. What other facets or aspects do you know about 13 of the Polo Cove project? 14 MR. WILLIAMS: Object to the form. 15 THE WITNESS: Just what I've said before, that 16 it was going to have a winery and... 17 Q. (BY MR. CLARK) You mentioned consultant. Did 18 you receive any payments for consulting fees through the 19 Berryhill &amp; Company Restaurant? 20 A. Not regarding Polo Cove. 21 MR. WILLIAMS: Object to the form. 22 Q. (BY MR. CLARK) Were there other consulting 23 fees? 24 A. I remember one consultant job. I think it was a 25 restaurant in McCall.</p>	<p style="text-align: right;">Page 53</p> <p>1 the day-to-day operations man with regard to Polo Cove? 2 A. No. I never heard it. 3 I never had that impression. I don't remember 4 that specifically. 5 Q. What was your impression of Mr. Berryhill's 6 involvement in the Polo Cove project? 7 MR. WILLIAMS: Object to the form. 8 THE WITNESS: He was going to oversee, that he 9 was going to oversee the restaurant. And my 10 understanding, that was his focus. 11 Q. (BY MR. CLARK) But you understood the project 12 involved more than just the restaurant? 13 A. Correct. 14 Q. Okay. 15 A. And, you know, I thought in Polo Cove that there 16 were different experts. One of them was involved in 17 wine. 18 You know, Glenn was kind of -- my perception was 19 he was the fundraiser. You know, John I think it was 20 Bellissimo. He was someone else talking to people, 21 getting them interested in this project. 22 Q. So it just wasn't Mr. Berryhill and 23 Mr. Mosell? 24 A. Not in Polo Cove. 25 Q. But your understanding, that was the situation</p>

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<p style="text-align: right;">Page 54</p> <p>1 with the downtown restaurant?</p> <p>2 A. That was MoBerry; yeah. Yeah, that that was</p> <p>3 going to become MoBerry, and that together that would be</p> <p>4 a part of Polo Cove.</p> <p>5 Q. So was it your impression that they are separate</p> <p>6 projects or entities?</p> <p>7 MR. WILLIAMS: Object to the form.</p> <p>8 THE WITNESS: Yeah. Yeah.</p> <p>9 Q. (BY MR. CLARK) Okay. There's been a contention</p> <p>10 that the relevant funds constituted an investment by</p> <p>11 Mosell Equities, LLC, in a speculative venture dealing</p> <p>12 with the proposed development of Polo Cove near Sunny</p> <p>13 Slope in Canyon County, Idaho.</p> <p>14 And from a pure accounting standpoint, did</p> <p>15 Berryhill &amp; Company as you know from the time you worked</p> <p>16 there ever account for these funds as an investment?</p> <p>17 MR. WILLIAMS: Object to the form.</p> <p>18 Foundation.</p> <p>19 THE WITNESS: No. It did not.</p> <p>20 My impression would be that if it was going to</p> <p>21 be an investment in Polo Cove, that it should have been a</p> <p>22 different checking account.</p> <p>23 MR. CLARK: Okay.</p> <p>24 Q. (BY MR. CLARK) Do you recall if there were</p> <p>25 legal fees -- well, let me give a little foundation.</p>	<p style="text-align: right;">Page 56</p> <p>1 Q. Okay.</p> <p>2 Do you recall that amount?</p> <p>3 A. No. I don't remember the exact amount, but it</p> <p>4 would have gone under legal and consulting.</p> <p>5 Q. Okay.</p> <p>6 That wouldn't be addressed on your --</p> <p>7 A. Not on a balance sheet. It would have been just</p> <p>8 an expense.</p> <p>9 Q. How would you list expenses? Would that be --</p> <p>10 A. Well, expenses would be on the profit and</p> <p>11 loss.</p> <p>12 Q. Okay. And did you create a profit and loss</p> <p>13 weekly, you said?</p> <p>14 A. No.</p> <p>15 Well, I would be monitoring it weekly, but I</p> <p>16 only created it -- because there's no point to printing</p> <p>17 this out and making it official until everything has been</p> <p>18 reconciled.</p> <p>19 And so, you know, this is done on the 1st. That</p> <p>20 means all of these accounts have been reconciled, and</p> <p>21 that's when you can print it. That's when it's</p> <p>22 official.</p> <p>23 Q. Okay. But do you do an end-of-the-month profit</p> <p>24 and loss?</p> <p>25 A. Yes. We would do it at the end of every</p>
<p style="text-align: right;">Page 55</p> <p>1 Were you aware of some litigation involving the</p> <p>2 Broadway Shopping Center or the restaurant on Broadway?</p> <p>3 A. Yes.</p> <p>4 Q. And what was your understanding was the status</p> <p>5 of that litigation when you became employed in October of</p> <p>6 '07?</p> <p>7 MR. WILLIAMS: Object to the form.</p> <p>8 THE WITNESS: My understanding was that they</p> <p>9 were suing each other for breach of contract.</p> <p>10 Q. (BY MR. CLARK) And you said "they." Can you</p> <p>11 elaborate? Just identify who they were.</p> <p>12 A. Yeah. I don't know who was listed on the</p> <p>13 paperwork, but at that point John and Glenn were very</p> <p>14 much united against Mike Macole (phonetic), or I can't</p> <p>15 remember what his last name is.</p> <p>16 Q. Was it Matsick (phonetic)?</p> <p>17 A. Yes.</p> <p>18 Q. And where I'm leading with this is, there was</p> <p>19 some resulting attorney fees from that litigation; is</p> <p>20 that right?</p> <p>21 A. Uh-huh.</p> <p>22 Q. Was there any accounting of those fees, the</p> <p>23 payment of those fees?</p> <p>24 A. Yes. I believe we paid them from the general</p> <p>25 checking account.</p>	<p style="text-align: right;">Page 57</p> <p>1 month.</p> <p>2 Q. Okay. I'm just going to run you through a</p> <p>3 couple of these documents if we could.</p> <p>4 (Exhibit 4 was marked.)</p> <p>5 Q. (BY MR. CLARK) Joy, I've handed you a document</p> <p>6 that says, "Berryhill &amp; Company," at the top. It's a</p> <p>7 little different format than No. 2 and No. 3.</p> <p>8 A. Right.</p> <p>9 Q. It says, "Register: Furniture and Fixtures, from</p> <p>10 01-31-07 to 12-31-07."</p> <p>11 A. Uh-huh.</p> <p>12 Q. What is that? Let me just ask you that.</p> <p>13 A. World market, the Cortese chairs are for the</p> <p>14 restaurant. Epitome was things like flowers and</p> <p>15 decorations for the restaurant. Home Fashions was the</p> <p>16 curtains for the remodel.</p> <p>17 Q. Well, is this a printout of an account in</p> <p>18 QuickBooks?</p> <p>19 A. Yes; correct, furniture and fixtures.</p> <p>20 Q. Okay. And that would be an expense account</p> <p>21 or billed account, or? How was this account classified?</p> <p>22 A. It is a balance sheet account, furniture and</p> <p>23 fixtures.</p> <p>24 Because this was something that could be</p> <p>25 depreciated. So we didn't just do it as an expense.</p>

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<p style="text-align: right;">Page 58</p> <p>1 Q. On Page 2, at the very bottom, there's an entry 2 of 12-31-07 for Polo Cove. It says, "Accounts Receivable 3 D," and then it's truncated. 4 Do you remember what the account is? 5 A. Accounts receivable? 6 Yes, this would have been -- this was directed 7 to me to do by Amy Dempsey. That was part of the 8 end-of-the-year thing that she had put together after the 9 taxes were finished. She told me to move that out. 10 Q. And there's another truncation here. It says, 11 "Lease Hold Im." 12 A. Improvements. Yeah. That would have been for 13 what was done in the ballroom. 14 Q. Okay. 15 It says, "Payee," and then, "Polo Cove," right 16 at the very bottom. 17 A. Uh-huh. 18 Q. And I may have asked you this already, and I 19 apologize, but was there a separate Polo Cove account or 20 accounts? 21 MR. WILLIAMS: Object to the form. 22 THE WITNESS: Polo Cove was what was called a 23 customer. I billed them, I invoiced them for the rents, 24 and so I named that customer here. 25 MR. CLARK: Okay. Okay.</p>	<p style="text-align: right;">Page 60</p> <p>1 MR. WILLIAMS: Object to the form. 2 THE WITNESS: They created curtains. They were 3 our seamstress. 4 Q. (BY MR. CLARK) Okay. But what I'm asking is, 5 is it something that would be used in the build-out in 6 the restaurant? 7 A. Yes. Because if it's under leasehold 8 improvements, then it was something that was done for the 9 restaurant. 10 And I must have been reimbursing her for 11 receipts, so that is why I listed in the memo the names 12 and what it was for. 13 Q. So there would be a separate -- for example, for 14 Amy Berryhill, 12-6-2007 reference 27100, is that 15 reference number -- 16 A. It's a check number. 17 Q. Okay. 18 And paid to Amy Berryhill, Bank of the Cascades 19 accounts for Home Fashions and \$2,392. So there would be 20 a corresponding receipt somewhere? 21 A. Yes. There would have been receipts for that. 22 Q. Okay. 23 A. And I would have stapled it to the check stub, 24 because I always kept the bottom voucher and stapled it 25 all together.</p>
<p style="text-align: right;">Page 59</p> <p>1 Q. (BY MR. CLARK) And it indicates John Berryhill 2 as a payee, Amy Berryhill as a payee. What are those 3 payments for? 4 A. I don't remember. 5 You know, Home Fashions and Builders Lighting 6 were both vendors for our improvements for the ballroom, 7 but I don't remember why. It looks like she -- you know, 8 it looks like a check. 9 Q. And that's what the Bank of the Cascades would 10 be, the checks? 11 A. Checking account; yeah. 12 Q. Okay. 13 So looking just above the Polo Cove, there's 14 three listings for Amy Berryhill, Home Fashions, 15 hardware, Builders Lighting. Are those checks cut to 16 her? 17 A. Yes. 18 Q. For Home Fashions, hardware? 19 A. Correct. 20 And if she presented receipts to me for 21 something she had paid for personally, then I would 22 reimburse her for that. 23 Q. But, for example, Home Fashions, those would 24 be -- 25 A. They were --</p>	<p style="text-align: right;">Page 61</p> <p>1 Q. And who has that information now? 2 A. It should be in the files. 3 MR. WILLIAMS: Object to form. Foundation. 4 THE WITNESS: She would have returned the 5 receipts over to me. And so then I would have filed them 6 in the book. 7 Q. (BY MR. CLARK) Okay. So at least it was your 8 policy to maintain those records at Berryhill &amp; 9 Company? 10 A. Yes. 11 (Exhibit 5 was marked for identification.) 12 Q. (BY MR. CLARK) Joy, we are getting down to the 13 end here. 14 A. Okay. 15 Q. I've just got a couple more questions. 16 A. Okay. 17 Q. My understanding is this was an e-mail sent from 18 Mr. Mosell to Mr. Berryhill with you as a cc recipient. 19 A. Okay. 20 Q. Do you recall receiving this? 21 A. I don't remember it. 22 Q. October 7, 2008? 23 A. I don't remember seeing it, but that doesn't 24 mean that I didn't. 25 Q. Do you recall meeting with Mr. Mosell or</p>

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<p style="text-align: right;">Page 62</p> <p>1 Mr. Berryhill as a result of this letter?</p> <p>2 A. No. I don't think that meeting ever happened.</p> <p>3 Q. Were you aware of any request or conversation by</p> <p>4 Mr. Mosell with Mr. Berryhill about confirming the</p> <p>5 partnership or Mr. Mosell withdrawing his position from</p> <p>6 or requesting his money back or anything along those</p> <p>7 lines?</p> <p>8 MR. WILLIAMS: Object to the form</p> <p>9 THE WITNESS: I remember around September of '08</p> <p>10 their relationship began to dissolve.</p> <p>11 John had said that they had gotten together and</p> <p>12 that Glenn had said he could no longer be as invested in</p> <p>13 Berryhill &amp; Company as he had been up to that point and</p> <p>14 that he requested to receive some of his moneys back,</p> <p>15 that he could be a partial investor, but not as heavily</p> <p>16 invested as he was anymore.</p> <p>17 And John said he asked him, that Glenn asked</p> <p>18 John to try to find other people to invest so that he</p> <p>19 could get some of his money back out of the company.</p> <p>20 Q. (BY MR. CLARK) You had a conversation with</p> <p>21 Mr. Berryhill about that?</p> <p>22 A. Yes. John told me that that had happened.</p> <p>23 Q. Okay. And what was Mr. Berryhill's response?</p> <p>24 A. Concern. I know that he was thinking about it a</p> <p>25 lot.</p>	<p style="text-align: right;">Page 64</p> <p>1 pull from that to pay for staff.</p> <p>2 And, you know, the restaurant business is very</p> <p>3 seasonal. So to max out those lines of credit would have</p> <p>4 compromised his company.</p> <p>5 Q. Well, you say, "his company." Whose company are</p> <p>6 you referring to?</p> <p>7 A. Well, Berryhill &amp; Company. It would have</p> <p>8 compromised Berryhill &amp; Company.</p> <p>9 Q. And at that time based on an accounting</p> <p>10 standpoint anyway, Mr. Mosell did not have an equity</p> <p>11 position in the company?</p> <p>12 MR. WILLIAMS: Object to form.</p> <p>13 THE WITNESS: Correct. He was not a partner</p> <p>14 yet.</p> <p>15 MR. CLARK: He was a lender; correct?</p> <p>16 MR. WILLIAMS: Object to form.</p> <p>17 THE WITNESS: According to the books, he was a</p> <p>18 lender.</p> <p>19 Q. (BY MR. CLARK) And is that what you discussed</p> <p>20 with Mr. Berryhill in this time-frame, was paying</p> <p>21 Mr. Mosell or Mosell Equities loans back?</p> <p>22 MR. WILLIAMS: Object to the form.</p> <p>23 THE WITNESS: I can remember asking that if he</p> <p>24 asked for all of his money back, what are we going to do.</p> <p>25 And there was just silence from both of us. We weren't</p>
<p style="text-align: right;">Page 63</p> <p>1 He didn't go into his response with me, only</p> <p>2 that it had happened.</p> <p>3 I could tell he was still processing it.</p> <p>4 You know, something we were both mutually aware</p> <p>5 of is that the economy had just really gone south, and so</p> <p>6 to find an investor seemed like a really big task at that</p> <p>7 time.</p> <p>8 And so to give money back at at that point would</p> <p>9 have put the restaurant in a very vulnerable situation.</p> <p>10 Q. Did Mr. Berryhill ask you if there were funds</p> <p>11 available to pay Mr. Mosell back?</p> <p>12 A. No.</p> <p>13 Q. Did you indicate that? Were there any</p> <p>14 discussions between you and Mr. Berryhill regarding the</p> <p>15 ability to pay Mr. Mosell back?</p> <p>16 A. We talked about what was left in the line of</p> <p>17 credit with Bank of the Cascades, and we looked at what</p> <p>18 we had from a credit standpoint.</p> <p>19 And I think we still had the Key Bank line of</p> <p>20 credit that was open. And this had been paid off in</p> <p>21 full.</p> <p>22 And so there were places that we could pull from</p> <p>23 those lines of credit in order to pay Glenn, but those,</p> <p>24 we also recognized that we needed those lines of credit</p> <p>25 as a revolving account, because sometimes you have to</p>	<p style="text-align: right;">Page 65</p> <p>1 sure what we would do.</p> <p>2 Q. (BY MR. CLARK) Were you aware or do you</p> <p>3 understand that Mr. Mosell asked for money back?</p> <p>4 A. Yes, John told me that he asked for some of his</p> <p>5 money back.</p> <p>6 Q. And what did Mr. Berryhill tell you to do?</p> <p>7 A. Well, he didn't tell me to do one thing or</p> <p>8 another, because it was something that he was thinking</p> <p>9 about.</p> <p>10 Q. Were you aware that -- I know you talked about a</p> <p>11 meeting with an attorney in early 2008. Were you aware</p> <p>12 at least from an accounting standpoint of the funds ever</p> <p>13 transitioning from, Mosell Equity funds transitioning</p> <p>14 from a long-term liability into an equity account?</p> <p>15 A. No. I was not.</p> <p>16 Q. And did Mr. Berryhill ever tell you to do</p> <p>17 that?</p> <p>18 A. No. He did not.</p> <p>19 Q. Just a few more things.</p> <p>20 MR. WILLIAMS: Never believe lawyers when they</p> <p>21 say that.</p> <p>22 MR. CLARK: I'll be brief.</p> <p>23 That's the biggest lie.</p> <p>24 I'm not going to make this an exhibit. I'll</p> <p>25 hand it around if anyone wants to take a look at it.</p>

17 (Pages 62 to 65)

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<p style="text-align: right;">Page 66</p> <p>1 THE WITNESS: Uh-huh.</p> <p>2 Q. (BY MR. CLARK) While you were working for</p> <p>3 Berryhill &amp; Company, did Mr. Berryhill create</p> <p>4 newsletters?</p> <p>5 A. Yes. He did.</p> <p>6 Q. Is this one of those newsletters?</p> <p>7 A. Yes.</p> <p>8 Q. Do you remember off the top of your head how</p> <p>9 often he would create those newsletters?</p> <p>10 A. Well, we only created them to print, I believe,</p> <p>11 on this one occasion and did a mailer, because it was</p> <p>12 such a big deal to move back downtown.</p> <p>13 He actually printed and sent this before I came</p> <p>14 on staff.</p> <p>15 Because that was in August.</p> <p>16 But we would send out newsletters frequently</p> <p>17 with Constant Contact.</p> <p>18 Q. Do you know if those are maintained, those</p> <p>19 newsletters are maintained at Berryhill &amp; Company?</p> <p>20 A. Yes. They are in the office.</p> <p>21 Q. Was there a Berryhill &amp; Company website?</p> <p>22 A. Yes. There is.</p> <p>23 Q. Do you know who provided input for the</p> <p>24 information contained on the website?</p> <p>25 MR. WILLIAMS: Object to the form. Vague as to</p>	<p style="text-align: right;">Page 68</p> <p>1 consulting company or a PR firm that you were aware of?</p> <p>2 MR. WILLIAMS: Object to the form.</p> <p>3 THE WITNESS: Vaguely, Forsdale.</p> <p>4 Mr. Forsdale Design; yeah.</p> <p>5 Q. (BY MR. CLARK) Was he involved with the</p> <p>6 website?</p> <p>7 A. I don't think. I don't think so. But I don't</p> <p>8 remember.</p> <p>9 Q. What was Mr. Forsdale involved in, if you</p> <p>10 know?</p> <p>11 MR. WILLIAMS: Object to form.</p> <p>12 THE WITNESS: I'm not sure.</p> <p>13 Q. (BY MR. CLARK) Did you get involved in any of</p> <p>14 the advertising or the PR at all?</p> <p>15 A. Some.</p> <p>16 You know, I offered feedback, but John did a lot</p> <p>17 of his own designs and spent a lot of time creating</p> <p>18 things that were going to go out for publicity.</p> <p>19 Q. And again, were those maintained at Berryhill &amp;</p> <p>20 Company?</p> <p>21 A. Yes.</p> <p>22 (Exhibit 6 was marked.)</p> <p>23 Q. (BY MR. CLARK) Joy, I know you testified that</p> <p>24 you mostly interacted with Mr. Berryhill on a</p> <p>25 face-to-face basis, but I've handed you a document that</p>
<p style="text-align: right;">Page 67</p> <p>1 time.</p> <p>2 THE WITNESS: Yes, several people did. There</p> <p>3 was the web designer, and then one of our staff members,</p> <p>4 Amanda, and then John did.</p> <p>5 Q. (BY MR. CLARK) Did you ever review that</p> <p>6 website?</p> <p>7 A. Yes.</p> <p>8 Q. Do you ever remember or recall seeing any</p> <p>9 references to Polo Cove?</p> <p>10 A. Yes. It was listed on one of the tabs.</p> <p>11 Q. Who was the website creator?</p> <p>12 A. John.</p> <p>13 Well, I mean, he didn't design it.</p> <p>14 Q. Let me ask a better question.</p> <p>15 A. Yeah.</p> <p>16 Q. Who was the website designer?</p> <p>17 A. I cannot remember her name.</p> <p>18 Q. Was there any PR people associated with</p> <p>19 Berryhill &amp; Company? Do you recall?</p> <p>20 A. We talked to a PR person at one point and then</p> <p>21 decided not to go with her.</p> <p>22 So there was never one specifically for</p> <p>23 Berryhill that I remember.</p> <p>24 Q. Was there somebody -- I'm trying to remember a</p> <p>25 name that I've heard kicked around. Is there a</p>	<p style="text-align: right;">Page 69</p> <p>1 appears to me to be dated July 14th, 2005. It has got a</p> <p>2 subject line, priority line, status, percent complete.</p> <p>3 Have you ever seen something like this before?</p> <p>4 A. No.</p> <p>5 Q. Okay.</p> <p>6 You didn't receive this type of document from</p> <p>7 Mr. Berryhill while you were working there?</p> <p>8 A. No. I did not.</p> <p>9 Q. Okay. I think I've just got one more area.</p> <p>10 With regard to Berryhill &amp; Company corporate</p> <p>11 formalities, were you ever involved in shareholder or</p> <p>12 director meetings?</p> <p>13 A. No.</p> <p>14 I mean, if it came time for one, basically the</p> <p>15 shareholders were he and Amy, and so basically I typed up</p> <p>16 the shareholder minutes, which I actually received the</p> <p>17 format to use from Victoria Meyer, and then we were</p> <p>18 probably five or six years behind in getting those</p> <p>19 created, so I typed them up with the format that Victoria</p> <p>20 Meyer gave me and then submitted them to John and Amy to</p> <p>21 sign.</p> <p>22 And then basically we just noted on years where</p> <p>23 there was significant change, that would be noted in the</p> <p>24 minutes.</p> <p>25 Q. Okay. Do you know who maintains those</p>

18 (Pages 66 to 69)

DEPOSITION OF JOY LUEDTKE TAKEN 1-13-10

<p style="text-align: right;">Page 70</p> <p>1 records?</p> <p>2 A. Now?</p> <p>3 Q. Yes.</p> <p>4 A. No, I don't. No, I don't.</p> <p>5 Q. Do you recall whether there was a shareholders</p> <p>6 director meeting actually conducted while you were</p> <p>7 there?</p> <p>8 A. There was not a meeting.</p> <p>9 Q. Okay.</p> <p>10 A. Unless they had it at home.</p> <p>11 I mean, they live together, so.</p> <p>12 MR. CLARK: That's all I have.</p> <p>13 Thank you very much.</p> <p>14 MR. WILLIAMS: Okay.</p> <p>15 MR. CLARK: Can I ask one more question?</p> <p>16 Sorry about that.</p> <p>17 Q. (BY MR. CLARK) Did you ever have any</p> <p>18 interaction while you were working at Berryhill &amp; Company</p> <p>19 with a Michael Gillis?</p> <p>20 A. Name is familiar. Is he with the Capital Club?</p> <p>21 Q. Capital Club.</p> <p>22 A. I know that he was having several meetings with</p> <p>23 John about going in on -- I think he was the third</p> <p>24 floor.</p> <p>25 I met him, but I didn't sit in on their</p>	<p style="text-align: right;">Page 72</p> <p>1 A. No. I don't think it ever went in.</p> <p>2 MR. CLARK: Okay. Thank you very much.</p> <p>3 THE WITNESS: You are welcome.</p> <p>4 EXAMINATION</p> <p>5 BY MR. WILLIAMS:</p> <p>6 Q. Ms. Luedtke, we were introduced at the</p> <p>7 beginning. My name is Dan Williams. I represent the</p> <p>8 defendants in this lawsuit, which are Berryhill &amp;</p> <p>9 Company, Inc. and John Berryhill, individually.</p> <p>10 A. Is Amy still listed?</p> <p>11 Q. She is not.</p> <p>12 A. Okay.</p> <p>13 Q. Let me ask you what I think will be easy</p> <p>14 questions first.</p> <p>15 Do you have any training as a lawyer?</p> <p>16 A. No.</p> <p>17 Q. Do you have any training as an accountant or a</p> <p>18 CPA?</p> <p>19 A. No.</p> <p>20 Q. Have you ever taken an accounting class?</p> <p>21 A. No.</p> <p>22 Q. As I understood your testimony from the very</p> <p>23 beginning of the morning, you learned bookkeeping</p> <p>24 basically on the job?</p> <p>25 A. Uh-huh.</p>
<p style="text-align: right;">Page 71</p> <p>1 meetings.</p> <p>2 Q. And what was the project?</p> <p>3 A. A gentlemen's -- kind of a private club.</p> <p>4 It might have been men and female. Basically,</p> <p>5 it was going to be a competitor to the Arid Club.</p> <p>6 Q. A Berryhill &amp; Company project?</p> <p>7 A. No.</p> <p>8 Q. Or a John Berryhill project?</p> <p>9 A. No. No, it was a Michael Gillis project, and he</p> <p>10 was -- I believe they were meeting at first because it</p> <p>11 was just a possible competitor to us in the same</p> <p>12 building, and they worked out that we would actually</p> <p>13 provide the food.</p> <p>14 Q. Well, I have what appears to be some type of PR</p> <p>15 document from the Capital Club, and it says, "We are</p> <p>16 pleased to partner with Berryhill &amp; Company to provide</p> <p>17 access to their full menu."</p> <p>18 Were you ever aware of any type of partnership?</p> <p>19 Ever?</p> <p>20 A. Just that there was an agreement that we were</p> <p>21 going to -- you know, that we would be providing the food</p> <p>22 for them.</p> <p>23 I don't think the partnership was formal.</p> <p>24 Q. Did that ever come to fruition, that</p> <p>25 relationship?</p>	<p style="text-align: right;">Page 73</p> <p>1 Q. Is that a yes?</p> <p>2 A. Yes.</p> <p>3 Q. Mr. Clark asked you about quite a few</p> <p>4 conversations that you had with Mr. Berryhill this</p> <p>5 morning.</p> <p>6 Am I correct that you are relying on your memory</p> <p>7 of those conversations?</p> <p>8 A. Yes.</p> <p>9 Q. Do you have any diary entries about any of those</p> <p>10 conversations?</p> <p>11 A. No.</p> <p>12 Q. Were any of the conversations that you discussed</p> <p>13 this morning, were you quoting John Berryhill verbatim in</p> <p>14 any of them?</p> <p>15 A. No.</p> <p>16 Q. With regard to the Polo Cove development, were</p> <p>17 you aware that John had meetings with architects</p> <p>18 regarding Polo Cove?</p> <p>19 A. Not specifically. It wouldn't surprise me,</p> <p>20 but.</p> <p>21 Q. When you say it wouldn't surprise you, what do</p> <p>22 you mean?</p> <p>23 A. He was very involved in the project, and so if</p> <p>24 we were meeting -- he had a lot of meetings about Polo</p> <p>25 Cove.</p>

19 (Pages 70 to 73)

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DEPOSITION OF JOY LUEDTKE TAKEN 1-13-10

<p style="text-align: right;">Page 74</p> <p>1 Q. And I take it he didn't tell you about each and 2 every meeting he was having? 3 A. Oh, of course not. 4 Q. Were you aware that Mr. Berryhill had Polo Cove 5 business cards? 6 A. Yes. 7 Q. Do you recall what his designation on those 8 business cards was? 9 A. I don't remember. 10 Q. Were you aware that his business card said 11 partner? 12 A. Yeah. 13 Q. On Polo Cove? 14 A. Uh-huh. 15 Q. Yes? 16 A. Yes. 17 Q. Were you ever aware that Mr. Mosell executed a 18 personal guaranty with the landlord at Plaza 121? 19 A. Yes. 20 Q. And did you have any understanding as to what 21 space he was personally guarantying with the landlord? 22 A. My understanding was he was personally 23 guarantying for everything. 24 Q. You mentioned earlier this morning that the 25 showroom for Polo Cove that was planned -- well, I think</p>	<p style="text-align: right;">Page 76</p> <p>1 until later in 2008? 2 A. Correct. 3 Q. When did that meeting take place? 4 A. Meeting with Victoria Meyer? 5 Q. No. No. No. This conversation that you had 6 with John. 7 A. Same day as the meeting with Victoria Meyer. 8 Q. Can you give us a month? 9 A. My guess would be January. 10 Q. Of '08? 11 A. Of '08; yes. 12 Q. Where were you? 13 A. Where were we? I was at the restaurant in the 14 offices. 15 Q. And what I had in my notes, anyway, was the 16 subject of whether this should remain as a long-term 17 liability came up, and you had a question about it. And 18 what I have down is you said, "I believe he said yes." 19 Do you recall that testimony this morning? 20 A. I could say it stronger than that, that John 21 told me, yes, that's how it would be. 22 Q. That that's how it would remain? 23 A. Yes. 24 Q. And your understanding is that was because the 25 formal partnership would be formed later?</p>
<p style="text-align: right;">Page 75</p> <p>1 your words were "never materialized". Do you recall that 2 testimony? 3 A. Yes. 4 Q. And by that did you mean that the showroom, 5 actually the Polo Cove showroom actually never became a 6 showroom for Polo Cove? 7 A. Correct. They actually -- John said they 8 decided to go with a different format, that having the 9 flat screens and sort of doing pictures of Polo Cove of 10 the space was probably not going to be the best decision, 11 and so it was decided that the showroom would be moved 12 instead actually to the space in Caldwell. 13 Q. You mentioned some conversation with 14 Mr. Berryhill after either he or he and Mr. Mosell had 15 met with Victoria Meyer. 16 A. Yes. 17 Q. And the subject of the conversation was the 18 funds provided by Mosell Equities to Berryhill &amp; Company, 19 Inc. Do you remember that? 20 A. Uh-huh; yes. 21 Q. And it was your understanding that the funds 22 should remain at that time as a long-term liability? 23 A. Right. 24 Q. And that was because the partnership, the plan 25 was for the partnership not yet to become formalized</p>	<p style="text-align: right;">Page 77</p> <p>1 A. Correct. 2 Q. In accounting parlance, do you understand or do 3 you believe you understand the distinction between a 4 long-term liability and a contingent liability? 5 A. Um, I would call a contingent liability to be 6 something like when this happens, versus long-term 7 liability, being that it would be paid off over a longer 8 period of time. 9 Q. Ms. Luedtke, I understand that you had a prior 10 meeting with either Mr. Clark or Mr. Clark and Mr. Mosell 11 regarding this case? 12 A. Just with Mr. Clark. 13 Q. Just with Mr. Clark. 14 When did that take place? 15 A. It was in August. 16 Q. Of '09? 17 A. Yes. 18 Q. Where was that held? 19 A. At Starbuck's downtown. 20 Q. And how did that meeting take place? I mean, 21 how did it arise? 22 A. Glenn and Eric both contacted me and requested 23 to meet. 24 Q. Why did you decide to meet with them? 25 A. Because they asked me to.</p>

20 (Pages 74 to 77)

DEPOSITION OF JOY LUEDTKE TAKEN 1-13-10

<p style="text-align: right;">Page 78</p> <p>1 Q. Did you know what the subject was of the</p> <p>2 meeting?</p> <p>3 A. Well, I knew that there was an issue with their</p> <p>4 partnership.</p> <p>5 Q. How long did the meeting last?</p> <p>6 A. Um, an hour.</p> <p>7 Q. Mr. Clark ask you questions?</p> <p>8 A. Yes.</p> <p>9 Q. Do you recall any questions he asked that you</p> <p>10 have not been asked today?</p> <p>11 A. No.</p> <p>12 Q. Did he show you any documents?</p> <p>13 A. He showed me a bill that Mary had given him for</p> <p>14 some kitchen expenses that Mary had said were John's.</p> <p>15 Q. To Glenn?</p> <p>16 A. To Eric.</p> <p>17 Q. Who is Mary?</p> <p>18 A. She was the bookkeeper before me.</p> <p>19 Q. Did you understand what the point of that</p> <p>20 document was?</p> <p>21 A. Well, just trying to see if there were personal</p> <p>22 expenses that were being paid for out of Berryhill &amp;</p> <p>23 Company.</p> <p>24 Q. Are you aware of personal expenses being paid</p> <p>25 for out of Berryhill &amp; Company?</p>	<p style="text-align: right;">Page 80</p> <p>1 relationship was created or whether this really</p> <p>2 constitutes a loan?</p> <p>3 A. Right.</p> <p>4 Q. You are just talking about how it appeared in</p> <p>5 the books as far as you were concerned?</p> <p>6 A. Correct.</p> <p>7 MR. WILLIAMS: That's all I have.</p> <p>8 FURTHER EXAMINATION</p> <p>9 BY MR. CLARK:</p> <p>10 Q. Mr. Williams asked you about your formal</p> <p>11 training as an accountant. Let me just elaborate on that</p> <p>12 a little bit.</p> <p>13 If you had any questions about the proper</p> <p>14 accounting for the Berryhill &amp; Company books, who would</p> <p>15 you ask?</p> <p>16 A. First, I would have asked my advisor, my</p> <p>17 QuickBooks advisor, and then ultimately, if she didn't</p> <p>18 have the answer, then it went to the accountant.</p> <p>19 Q. And ultimately, everything was reviewed and</p> <p>20 approved by Mr. Berryhill?</p> <p>21 A. Yes.</p> <p>22 Q. Okay.</p> <p>23 If you had any questions about accounting, you</p> <p>24 could ask Mr. Berryhill as well?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 79</p> <p>1 A. Meals maybe when he goes out get called research</p> <p>2 and development, and his dry-cleaning goes through the</p> <p>3 restaurant, and then the company receives a store credit.</p> <p>4 The restaurant credit, at the end of every year they got</p> <p>5 a gift card for the balance of what that was, but that</p> <p>6 was the only...</p> <p>7 Q. The dry-cleaning includes his chef wear;</p> <p>8 correct?</p> <p>9 A. Technically, yes, but there wasn't a whole lot</p> <p>10 that would go through. But there was some; yeah.</p> <p>11 Q. Ms. Luedtke, as I understand your testimony, the</p> <p>12 funds from Mosell Equities were placed by you as a</p> <p>13 long-term liability?</p> <p>14 A. Yes.</p> <p>15 Q. Correct?</p> <p>16 A. Yes.</p> <p>17 Q. And that was after Mr. Mosell had told you</p> <p>18 that's how it should be accounted for and Mr. Berryhill</p> <p>19 said yes?</p> <p>20 A. Yes.</p> <p>21 Q. And it remained accounted in that way until the</p> <p>22 end of your employment with Berryhill &amp; Company, Inc.?</p> <p>23 A. Yes.</p> <p>24 Q. And I take it aside from that, you are not</p> <p>25 expressing opinions, are you, about what legal</p>	<p style="text-align: right;">Page 81</p> <p>1 Q. And you did?</p> <p>2 A. Yes.</p> <p>3 Q. Okay.</p> <p>4 With regard to this question about long-term</p> <p>5 liability versus contingent liability --</p> <p>6 A. Uh-huh.</p> <p>7 Q. -- are you aware that the Mosell Equities' money</p> <p>8 was changed from a long-term liability to a contingent</p> <p>9 liability on the Berryhill &amp; Company books?</p> <p>10 A. No. I was not aware of that.</p> <p>11 Q. Did that occur at any time while you were</p> <p>12 working there?</p> <p>13 A. No. It did not.</p> <p>14 MR. CLARK: Okay. That's all I have.</p> <p>15 Thank you very much, Joy. I appreciate it.</p> <p>16 THE WITNESS: You are welcome.</p> <p>17 (Conclusion of proceedings at 12:20 p.m.)</p> <p>18 (Signature requested.)</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

21 (Pages 78 to 81)

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DEPOSITION OF JOY LUEDTKE TAKEN 1-13-10

Page 82

1 VERIFICATION

2 STATE OF IDAHO }

} ss:

3 COUNTY OF ADA }

4  
5 I, JOY LUEDTKE, being first duly sworn on my  
6 oath depose and say:

7 That I am the witness named in the foregoing  
8 deposition taken the 13th day of January, 2010,  
9 consisting of pages numbered 1 through 82, inclusive;  
10 that I have read the said deposition and know the  
11 contents thereof; that the questions contained  
12 therein were propounded to me; the answers as  
13 contained therein (or as corrected by me therein)  
14 are true and correct.  
15

16  
17 JOY LUEDTKE

18 Subscribed and sworn to before me this \_\_\_\_\_ day  
19 of \_\_\_\_\_, 2010, at \_\_\_\_\_, Idaho.  
20

21  
22 Notary Public for Idaho

23 Residing at \_\_\_\_\_, Idaho.

24 My Commission Expires: \_\_\_\_\_  
25

Page 83

1 REPORTER'S CERTIFICATE

2  
3 STATE OF IDAHO )

) ss.

4 COUNTY OF ADA )

5 I, LEDA WADDLE, CSR, (Idaho No. 758) and  
6 Notary Public in and for the State of Idaho, do hereby  
7 certify:

8 That prior to being examined, the witness named  
9 in the foregoing deposition was by me duly sworn to  
10 testify to the truth, the whole truth, and nothing but  
11 the truth.

12 That said deposition was taken down by me in  
13 shorthand at the time and place therein named and  
14 thereafter reduced to typewriting under my direction,  
15 and that the foregoing transcript contains a full,  
16 true, and verbatim record of said deposition.

17 I further certify that I have no interest in  
18 the event of the action.

19 WITNESS my hand and seal this 20th day of  
20 January, 2010.  
21

22 LEDA WADDLE

23 Idaho CSR No. 758,

24 Notary Public in and for the  
25 State of Idaho.

My Commission Expires December 14, 2011.

22 (Pages 82 to 83)

BURNHAM HABEL & ASSOCIATES, INC. (208) 345-5700

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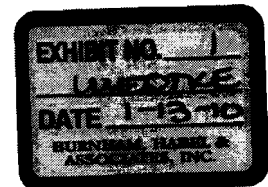
3:36 PM

07/01/08


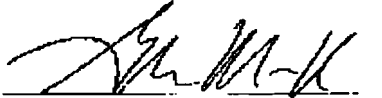
Accrual Basis

**Berryhill & Company Inc**  
**Balance Sheet**  
**As of June 30, 2008**

	<u>Jun 30, 08</u>
<b>ASSETS</b>	
<b>Current Assets</b>	
Checking/Savings	
BANK OF THE CASCADES - 4069	72,722.33
Key Checking - 2932	2,740.46
TIPPING PETTY CASH 2008	3,374.69
Total Checking/Savings	78,837.48
Accounts Receivable	
House Account	113.18
Accounts Receivable	17,107.78
Total Accounts Receivable	17,220.96
Other Current Assets	
Undeposited Funds	27.65
Total Other Current Assets	27.65
Total Current Assets	96,086.09
<b>Fixed Assets</b>	
Leasehold Improvements	228,311.71
Inventory on Hand	32,158.12
Equipment	204,081.86
Furniture and Fixtures	174,131.43
Vehicles	14,800.64
Accumulated Depreciation- Equip	-297,950.47
Total Fixed Assets	355,533.29
<b>TOTAL ASSETS</b>	<u><b>451,619.38</b></u>
<b>LIABILITIES &amp; EQUITY</b>	
<b>Liabilities</b>	
<b>Current Liabilities</b>	
Accounts Payable	
Accounts Payable	17,361.91
Total Accounts Payable	17,361.91
Other Current Liabilities	
BOTC - LINE OF CREDIT	122,299.67
Direct Deposit Liabilities	17.67
KeyBank L-O-C #1001 (50K)	25,000.00
Loan -Amy Berryhill	33,466.22
Sales Tax Payable	9,886.38
Payroll Liabilities	0.00
Reservation Fees & Deposits	500.00
BHC Gift Cards	21,574.47
Trade Accounts	1,198.16
Total Other Current Liabilities	213,942.57
Total Current Liabilities	231,304.48
<b>Long Term Liabilities</b>	
BOTC SBA Loan	100,000.00
Mosell Equities LLC	385,000.00
KeyBank Commercial Loan-0001	5,794.51
City of Boise SEWER - Broadway	5,208.11
City of Boise SEWER - Downtown	9,039.12
Total Long Term Liabilities	505,041.74
Total Liabilities	736,346.22
<b>Equity</b>	
BerryHill Equity	-50,000.00
Mosell Equity	20,000.00
Common Stock	200.00
Owners Draw	-5,089.81
Retained Earnings	-208,673.41
Net Income	-41,163.62





<b>MOSELL EQUITIES LLC</b> P.O. BOX 1604 EAGLE, ID 83626		02-700/2011 DEPOSITORS <b>5137</b>
DATE <u>7/30/07</u>		
PAY TO THE ORDER OF <u>Berryhill Co</u>	<u>\$25,000</u>	
<u>Twenty Five Thousand</u> <u>no/100</u>	TENS AMOUNT <u>25</u>	
 <b>Home Federal</b> MEMO <u>loan</u>		
⑆324170140⑆ 0097002028⑆ 5137 ⑆0002500000⑆		

000391

MOBILE EQUITIES LLC		5139
P.O. BOX 1000		
NILES, IL 60541		
DATE 8/7/07		
Pay to the order of <u>Perkins Co</u>		\$ 25,000
Twenty Five Thousand <u>no</u> / 100		DOLLARS
Home Federal		
Loan - TIS		
⑆324170140⑆ 0097002028 5139		


000392

MGSSELL EQUITIES LLC		98-7014/2004	5140
DATE 8/16/07			
Pay to the order of <u>Berryhill Co</u>		\$25,000-	
Twenty Five Thousand <u>no/100</u>		FOR DEPOSIT ONLY	
Home Federal		MEMO <u>beam #4</u>	
0324170140		0097002028 5140	

000393

MOSELL EQUITIES LLC		52-70147241	5141
P.O. BOX 1694		0097002028	
EAGLE RIDGE, NC 28615		DATE	8/16/07
Pay to the order of <u>Berryhill Companies</u>			\$ 25,000
Twenty Five Thousand <sup>00</sup> / <sub>100</sub>			
Home Federal		MEMO <u>Loan # 5</u>	
3241701404		0097002028 5141	

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<b>MOSELL EQUITIES LLC</b> P.O. BOX 1000 BAKERSFIELD, CA 93311		RE-7014/2001 00970028	<b>5196</b>
DATE <u>10/9/07</u>			
PAY TO THE ORDER OF <u>Berryhill &amp; Co.</u>		<u>\$ 60,000</u>	
<u>Sixty Thousand 00/100</u>			
<b>Home Federal</b> MEMO: Kitchen Equipment			
MICR: ⑆324170140⑆ 0097002028⑆ 5196			

000395



MOSELL EQUITIES LLC P.O. BOX 1694 EAGLE, ID 86636		5201
DATE: 10/26/07		
PAY TO: Berryhill Company		\$ 100,000
One Hundred Thousand and 00/100		DOLLARS
Home Federal Bank		
MEMO: Loan		
33241701401: 0097002028# 5201		

<b>MOSBY, EQUITIES LLC</b> P.O. BOX 1694 EAGLE, ID 83616		00-70140241 000700028	<b>5154</b>
DATE <u>12/4/07</u>			
PAY TO THE ORDER OF <u>Berryhill &amp; Co.</u>		<u>\$ 25,000</u>	
<u>Twenty Five Thousand &amp; 00/100</u>		EXEMPT <input type="checkbox"/> <input checked="" type="checkbox"/>	
<b>HomeFederal</b> MEMO: <u>Loan</u>		<u>12/11/07</u>	
⑆324170140⑆ 0097002028 5154			

000397

MOSELL EQUITIES LLC P.O. BOX 1094 EAGLE, ID 83616		98-7004/2009 000700208	5164
DATE 12/19/07			
PAY TO <i>Berryhill Co.</i>		\$ 50,000-	
<i>Fifty Thousand &amp; 00/100</i>			
Home Federal			
MEMO <i>Loan</i>		<i>Sm 1/1/11</i>	
⑆324170140⑆		0097002028 5164	

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Page 1 of 2

**MAR 22 2010**

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By R. WRIGHT  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
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Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

NOTICE OF HEARING RE:  
MOSELL EQUITIES' MOTION FOR  
PARTIAL SUMMARY JUDGMENT

TO: ABOVE NAMED DEFENDANTS AND THEIR COUNSEL OF RECORD:

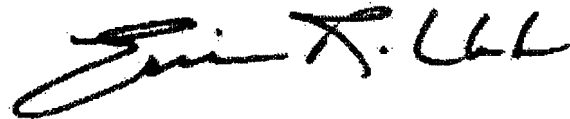
PLEASE TAKE NOTICE that on **Wednesday, April 21, 2010, at 2:45 p.m.**, or as soon  
thereafter as counsel can be heard, Plaintiff will call up for hearing MOSELL EQUITIES'  
MOTION FOR PARTIAL SUMMARY JUDGMENT before the Honorable Darla Williamson,  
District Judge, at the Ada County Courthouse, Boise, Idaho.

NOTICE OF HEARING RE: NOTICE OF HEARING RE:  
MOSELL EQUITIES' MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

000400

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of March, 2010.

CLARK & ASSOCIATES, ATTORNEYS



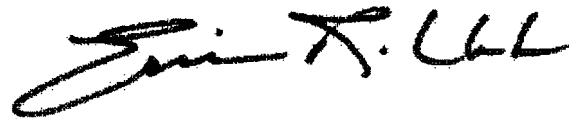
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Eric R. Clark

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22<sup>nd</sup> day of March, 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701  
(208) 345-7894



---

ERIC R. CLARK

NOTICE OF HEARING RE: NOTICE OF HEARING RE:  
MOSELL EQUITIES' MOTION FOR PARTIAL SUMMARY JUDGMENT - 2

000401

**ORIGINAL**

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 415

**MAR 22 2010**

J. DAVID NAVARRO, Clerk  
By P. BOURNE  
DEPUTY

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
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[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,  
Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

Defendants Berryhill & Company, Inc., and John E. Berryhill III, by and through their counsel of record, pursuant to the parties' Stipulation for Scheduling and Planning and Rule 56(c), I.R.C.P., hereby move the Court for summary judgment on all remaining counts set forth in Plaintiff's Amended Complaint.

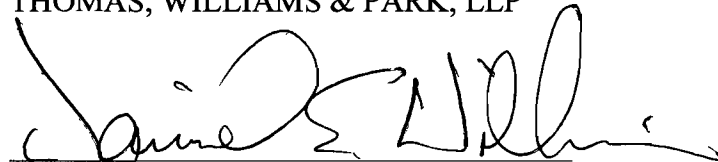
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, P. 1

000402

In support of this motion, Defendants rely on their Memorandum in Support of Motion for Summary Judgment, the Affidavit of John E. Berryhill III Re: Motion for Summary Judgment and the Affidavit of Daniel E. Williams Re: Motion for Summary Judgment, all filed concurrently.

DATED this 22<sup>nd</sup> day of March, 2010.

THOMAS, WILLIAMS & PARK, LLP



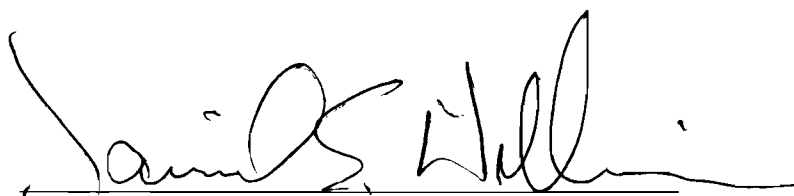
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of March, 2010, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail

  
Daniel E. Williams



NO. \_\_\_\_\_ FILED 415  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

J. DAVID NAVARRO, Clerk  
By R. BOURNE  
DEPUTY

### Attorneys for Defendants

**Defendants.**

**DEFENDANTS' MEMORANDUM  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

000404

## **STATEMENT OF MATERIAL FACTS**

This case arises from a failed business relationship. Plaintiff was the developer of a development near Sunnyslope in Canyon County, Idaho, to be known as “Polo Cove.”

According to the Plaintiff’s sole owner and managing member, Glenn E. Mosell, he approached John Berryhill initially about building a restaurant within the development:

In 2005 I – Mosell Equities secured a purchase of a vineyard on Homedale Road, and then went under contract on several adjacent properties to that vineyard. My vision to build a restaurant in the Idaho wine country on that site prompted me to contact John Berryhill for the first time. He was actually my first choice as the celebrity chef in town with the right flair, to anchor my wine country restaurant idea.<sup>1</sup>

Mosell first contacted Mr. Berryhill in the summer of 2005 (Mosell: 41). Asked about the evolution of his relationship with Mr. Berryhill “relative to his restaurant and Polo Cove,” Mosell answered:

Again, John as a restaurateur, we looked to him as a consultant to design a wine country restaurant; seating, layout. Worked with Sherry McKibben, architect; also Andy Erstad and Ken Reed, architects. And we have now a restaurant designed for Polo Cove.

\*\*\*

I was tapping into his expertise, using him as a consultant to design a wine country restaurant. That was the focus of our relationship. We discussed further involvement in the Polo Cove project beyond just being a restaurateur. So there is value that if a restaurant is built in a vineyard, the surrounding property’s value is enhanced. I introduced that concept to John, that he could then participate in some of those profits beyond daily restaurant operation and cash flow.

---

<sup>1</sup> Deposition of Glenn E. Mosell of February 5, 2008, at p. 39 in the action entitled *John Berryhill and Mosell Equities, L.L.C., v. Broadway Park, Inc., and Michael G. Matzek*, Case No. CV OC 07-00987 in the District Court of the Fourth Judicial District of the State of Idaho, In and For the County of Ada. Pertinent excerpts are attached to the Affidavit of Daniel E. Williams Re: Defendants’ Motion for Summary Judgment, filed concurrently, as Exhibit “A”. Subsequent references to this deposition testimony are cited to “Mosell” by page number.

\*\*\*

So we discussed ways of compensating John Berryhill for his talents, his culinary talents, his name recognition, his personality and flair as a restaurateur. It was not required that he build the restaurant himself or invest monies to participate in that enhancement of value to real estate.

We then discussed during that time period, time allocation of his services. If I take him from his catering and downtown restaurant efforts out to Polo Cove, what would the compensation formula be; how much time would he have to dedicate to Polo Cove versus his downtown restaurant endeavors? That was the evolution of which it made sense for me to buy into Berryhill and Company so that there was no competing activity. It's all blended, that Mosell business into Berryhill. We talked about Moberly Ventures as that entity, and that entity would operate a restaurant downtown; would operate a restaurant at Polo Cove. And we'd operate catering businesses around the valley, services.

(Mosell: 41-43) (emphasis added).

The following exchange confirms Mosell's intention of incorporating Berryhill & Company, Inc., within the Polo Cove effort:

- Q. Well, let me ask you to please follow up on that, cause I think I understand you correctly, that Mr. Berryhill had his name recognition and his flair and his culinary talents to offer to Polo Cove, right?
- A. Correct.
- Q. Although it doesn't sound like you contemplated his, Mr. Berryhill's, that is, direct investment in Polo Cove; you wanted to compensate him somehow—
- A. Correct.
- Q. —is that correct, for his time?
- A. Correct.
- Q. And in order to eliminate any competition, as you put it, or tension between his various activities, you undertook some sort of blending of operations; is that right?
- A. Exactly.

Q. Please describe for me the contracts and legal agreements that memorialize that blending, please, and that relationship.

A. Trout Jones had put together documents for Moberry Ventures, Inc., that we never finalized.

Q. Why were they not finalized?

A. Our focus was opening the restaurant downtown at the Plaza 121 during the second half of 2006, and we just haven't gotten to finalization of that Moberry entity. In lieu of my purchasing equity, I have loaned Berryhill and Company \$385,000.

Q. Mr. Mosell, you said in lieu of the purchase of equity you have loaned Berryhill \$385,000. Do you mean that as a permanent substitute or is that an interim?

A. Interim substitute.

(Mosell: 43-44).

On approximately June 28, 2007, Plaintiff provided Berryhill & Company, Inc., with a check for \$50,000. In a handwritten note on a copy of the check, which is signed by John Berryhill and Glenn Mosell, there appears the following:

This is a loan from Mosell Equities to cover some misc. downtown expenses during our bookkeeper transition. It will go into the general check register & be used for any billing of payables needed for downtown or Berryhill & Co. It will be transitioned into part of Glenn's "buy in" of Moberry Venture Corp. Inc.<sup>2</sup>

Subsequently, Mosell Equities provided a total of \$405,000 in funds to Berryhill & Company, Inc. Asked again about the terms of their arrangement, Glenn Mosell testified on February 5, 2008: "We have no contractual arrangement on Polo Cove. We have no contractual arrangement with Berryhill and Company at this point. No contract exists" (Mosell: 62).

For roughly three years, Mr. Berryhill devoted substantial amounts of time to the Polo Cove venture, meeting with architects, designers, potential vendors, vintners, hotel developers,

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<sup>2</sup> Exhibit A to Amended Complaint filed September 14, 2009.

county commissioners and others about the proposed restaurant, hotel and other parts of the developments.<sup>3</sup> Mr. Berryhill did so upon his understanding with Glenn Mosell, as Mosell testified above, that Berryhill & Company, Inc. would participate in the Polo Cove profits beyond operation of the restaurant. As part of their effort, Berryhill & Company, Inc., moved to downtown Boise at the Plaza 121 location. Mr. Mosell encouraged the move, wanting to “splash the pot,” that together they had “big things” to do. Throughout the construction of the new Berryhill & Company, Inc., restaurant, Mr. Mosell told Mr. Berryhill not to “cheap out,” not to worry about the cost of the buildout, saying “go big” and “do it sexy” (Berryhill: ¶ 5). Mr. Berryhill would not have agreed to the move downtown without Mosell’s encouragement and promised financial support (Berryhill: ¶ 6). A large portion of the funds provided by Mr. Mosell went to the buildout of the new downtown space (Berryhill: ¶ 7). Mr. Mosell signed a personal guaranty with the landlord at Plaza 121, guaranteeing payment of the lease, including any modification.<sup>4</sup>

Mosell signed a letter of intent with the Plaza 121 landlord for additional space near the restaurant for a Polo Cove showroom, although Mr. Berryhill warned him it was too big and would significantly increase ongoing liabilities. Mosell responded that Mr. Berryhill was not looking at “the big picture.” Mr. Mosell could use the space for Polo Cove promotions during the day and Berryhill & Company, Inc., could use it for banquets and receptions in the evening (Berryhill: ¶ 8). Although Mosell paid rent for this area, he did not cover the Polo Cove portion of the buildout of the space. In late summer, 2008, Mosell discontinued paying rent altogether

---

<sup>3</sup> Affidavit of John Berryhill Re: Motion for Summary Judgment, ¶ 3. Subsequent references to this Affidavit are cited to “Berryhill” by paragraph number.

<sup>4</sup> Exhibit A to Answer, Counterclaim and Demand for Jury Trial filed December 21, 2009.

(Berryhill: ¶ 9). Berryhill & Company, Inc., is still paying rent on this additional space (Berryhill: ¶ 10). In answer to discovery requests, Berryhill & Company, Inc., has identified approximately \$927,415 in costs associated with move of the restaurant downtown, expansion space including the Polo Cove showroom, and ongoing rent obligations (Berryhill: ¶ 11).

On May 28, 2009, Plaintiff filed this action, initially alleging breach of oral contract and other claims.

### **ARGUMENT**

#### **I. Upon a motion for summary judgment, Plaintiff may not rely on speculation or a mere scintilla of evidence.**

Considering the standard under which a district court must review motions for summary judgment, in a frequently cited decision the U.S. Supreme Court stated:

[t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

In such a situation, the Court held "there can be 'no genuine issue as to any material fact' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all of other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2550, 91 L.Ed.2d 265, 273 (1986). In response, the non-moving party must come forward with "specific facts" showing a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986). Idaho's Rule 56(c) is nearly identical to its federal counterpart.

Upon a motion for summary judgment, although controverted facts are liberally construed in favor of the non-moving party and reasonable inferences which can be made from the record are made in favor of that party, *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 127

(2005), a “case must be anchored in something more than speculation and a mere scintilla of evidence is not enough to create a genuine issue.” *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517 (1991).

**II. Plaintiff’s claim for fraud is fatally flawed.**

At Count Five, Plaintiff asserts a claim based on fraud against Defendants John Berryhill and Berryhill & Company., Inc. Plaintiff bases its claim entirely upon paraphrased language in Exhibit A to the Amended Complaint, stating that the \$50,000 check copied at the top of the document is a “loan” that “will be transitioned into part of Glenn [Mosell’s] ‘buy in’ of Moberry Venture Corp Inc” (Amended Complaint: ¶ 34) Plaintiff now claims that this statement was false (Amended Complaint: ¶ 35) and John Berryhill knew the statement was false, because “upon receiving demand from Mosell Equities, Berryhill, through his counsel, denied that Mosell Equities’ loaned funds were loans at all” (Amended Complaint: ¶ 37).

**A. John Berryhill made no false representation of fact.**

Under clear Idaho authority,

Fraud requires: (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

*Maroun v. Wyreless Sys.*, 141 Idaho 604, 615 (2005), citing, *Lindberg v. Roseth*, 137 Idaho 222, 226, 46 P.3d 518, 522 (2002). The party alleging fraud must support the existence of each of the elements of the cause of action for fraud by pleading with particularity the factual circumstances constituting fraud. I.R.C.P. 9(b); *Theriault v. A.H. Robins*, 108 Idaho 303, 307, 698 P.2d 365, 369 (1985); *Galaxy Outdoor Advertising v. Idaho Transp. Dep’t*, 109 Idaho 692, 710 P.2d 602 (1985); *Witt v. Jones*, 111 Idaho 165, 722 P.2d 474 (1986). Furthermore, the party alleging an

action for fraud has the burden of proving all these elements at trial by clear and convincing evidence. *Faw v. Greenwood*, 101 Idaho 387, 613 P.2d 1338 (1980); *Smith v. King*, 100 Idaho 331, 597 P.2d 217 (1979); *Gneiting v. Clement*, 96 Idaho 348, 528 P.2d 1283 (1974).

Plaintiff's allegations relating to fraud cannot survive the scrutiny of a motion for summary judgment. Obviously, a statement or representation of fact must be made that is false. The statement Plaintiff complains about is not a recital or warranty by John Berryhill or Berryhill & Company, Inc. The statement in Exhibit A that the \$50,000 in funds was a "loan" that "will be transitioned" into part of Mosell's buy-in to a new entity to be formed simply is not a representation of fact, much less one that is false. A loan that "will be transitioned" is, quite simply, not a loan at all. And the language set forth in Exhibit A is not a representation of fact, but, if anything, an attempted legal characterization of the parties' intent.

Moreover, Exhibit A correctly and accurately set forth both of the parties' then-current intent, as confirmed by the sworn testimony of Glenn Mosell himself:

- Q. Please describe for me the contracts and legal agreements that memorialize that blending, please, and that relationship.
- A. Trout Jones had put together documents for Moberry Ventures, Inc., that we never finalized.
- Q. Why were they not finalized?
- A. "Our focus was opening the downtown at the Plaza 121 during the second half of 2006, and we just haven't gotten to finalization of that Moberry entity. In lieu of my purchasing equity, I have loaned Berryhill and Company \$385,000.
- Q. Mr. Mosell, you said in lieu of the purchase of equity you have loaned Berryhill \$385,000. Do you mean that as a permanent substitute or is that an interim?
- A. Interim substitute.

(Mosell: 44) (emphasis added). Here, Glenn Mosell confirms that the "loan" was a temporary



and interim substitute for a full agreement, rather than a permanent arrangement. Based on Mosell's own testimony, no statement in Exhibit A is false.

Even to whatever extent Exhibit A could be read to state anything false, any alleged misstatements of opinion or of the law are not representations of fact and cannot serve as the basis for a fraud claim.

The principle that fraud must rest on a misrepresentation of fact, and cannot be supported by a misstatement of opinion, is based on the theory that 'everyone is equally capable of determining the law, is presumed to know the law and is bound to take notice of the law and, therefore, in legal contemplation, cannot be deceived by representations concerning the law or permitted to say he or she has been misled.' Williston on Contracts, Misstatements of Law, § 69:10 (4th Ed.)(2004).

*Equal Justice Found. v. Deutsche Bank Trust Co. Ams.*, 412 F. Supp. 2d 790, 795 (S.D. Ohio 2005).

Apparently sensing this weakness, Plaintiff attempts to rewrite Exhibit A in its allegation set forth at paragraph 34, saying Berryhill represented to Mosell in writing that the funds "would remain as loans" and only if the parties formed a new business entity, then those funds "would be" transitioned. This Court may not allow Plaintiff to rewrite the alleged written representations so as to base a fraud claim, which must be supported by "an ample factual basis." *O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2<sup>nd</sup> Cir. 1991).

**B. Fraud cannot be based simply upon a failure to perform a contractual duty.**

Under Idaho law, as is generally the case, fraud cannot be based upon the failure to perform a contractual promise.

As a general rule, fraud cannot be based upon statements promissory in nature that relate to future actions or upon the mere failure to perform a promise or an agreement to do something in the future. *Pacific States Auto. Fin. Corp. v. Addison*, 45 Idaho 270, 261 P. 683 (1927). The allegedly false representation must concern past or existing material facts. *Maroun v. Wyreless Systems, Inc.*,

141 Idaho 604, 114 P.3d 974 (2005); *see also, In re Syntex Corp. Secs. Litig.*, 95 F.3d 922, 934 (9th Cir. 1996) (Predictions proved to be wrong in hindsight do not render the statements untrue when made).

*DeVries v. DeLaval, Inc.*, 2006 U.S. Dist. LEXIS 41599, 21-22 (D. Idaho 2006) (construing Idaho law). The reason for this general rule is obvious:

Fraud is an intentional tort, the plaintiff claims to have been cheated. Put more succinctly, there is a fundamental difference between 'a statement that is false when made and a promise that becomes false only when the promisor later fails to keep his word.' *City of Richmond v. Madison Mgt. Group, Inc.*, 918 F.2d 438, 447 (4th Cir. 1990) (quoting *Lissmann v. Hartford Fire Ins. Co.*, 848 F.2d 50, 53 (4th Cir. 1988)). The law regards the former as a more serious wrong. Fraud, of course, is easily and often claimed, but the many elements which must be proved by the higher standard of "clear, satisfactory and convincing" evidence make fraud more difficult to prove as it should be given the gravity of the allegation.

*Empls Mut. Cas. Co. v. Collins & Aikman Floor Coverings, Inc.*, 2004 U.S. Dist. LEXIS 7192, 55-56 (S.D. Iowa Feb. 13, 2004). Or, as the Fourth Circuit Court of Appeals explained,

A Supreme Court of Virginia case, not cited by the parties or the district court, nicely sets the distinction between a statement actionable as a breach of contract and a statement actionable as a fraud. *Colonial Ford Truck Sales, Inc. v. Schneider*, 228 Va. 671, 325 S.E.2d 91(1985). *Colonial Ford* distinguishes between a statement that is false when made and a promise that becomes false only when the promisor later fails to keep his word. The former is fraud, the latter is breach of contract. A promise to perform an act in the future is not, in a legal sense, a representation as that term is used in the fraud context. *Soble v. Herman*, 175 Va. 489, 9 S.E.2d 459 (1940). The reason is obvious. Without that rule almost every breach of contract could be claimed to be a fraud.

*Lissmann v. Hartford Fire Ins. Co.*, 848 F.2d 50, 53 (4th Cir. 1988) (emphasis added).

Thus, to the extent that Plaintiff's claim for fraud is based simply upon the failure of Defendant Berryhill & Company, Inc., to acknowledge its alleged debt and provide repayment, Plaintiff's claim fails.

**C. Plaintiff does not sustain a claim for fraud in the inducement.**

The sole exception to the line of authority set forth above occurs when a party makes a contractual promise it has no present intention of keeping. As the Idaho Supreme Court explained:

Generally, the representation forming the basis of a claim for fraud must concern past or existing material facts. Representations concerning future events are usually not considered actionable. *First Sec. Bank of Idaho v. Webster*, 119 Idaho 262, 268, 805 P.2d 468, 474 (1991). A promise or statement that an act will be undertaken, however, is actionable, if it is proven that the speaker made the promise without intending to keep it. *Id.* Therefore, CPP's representations as to future events would be actionable only if Magic Lantern could show that CPP made these representations without intending to honor them.

CPP presented evidence that CPP had intended to do business with Magic Lantern as represented and that CPP abandoned the project only after the negotiations with Magic Lantern did not produce an agreement. Magic Lantern did not produce any evidence suggesting that at the time of the alleged representations CPP did not intend to carry out the project and to include Magic Lantern as represented. Therefore, the trial court was correct in granting summary judgment dismissing the fraud claim.

*Magic Lantern Prods. v. Dolsot*, 126 Idaho 805, 807 (1995), *overruled on other grounds*, *Great Plains Equip. v. Northwest Pipeline Corp.*, 136 Idaho 466 (2001).

Here, Plaintiff pleads with particularity nothing suggesting that Defendant Berryhill & Company, Inc., or its agent, Mr. Berryhill, had a present intention not to perform the alleged loan agreement set forth at Exhibit A to the Amended Complaint. Instead, Plaintiff cites only to the fact that upon demand, Berryhill & Company, Inc., responded and “through his [sic] counsel, denied that Mosell Equities’ loaned funds were loans at all” (Amended Complaint: ¶ 37). Plaintiff simply fails to sustain its burden of demonstrating a genuine issue of material fact upon this essential element of a fraud in the inducement claim.

**D. Plaintiff had no right to rely upon the alleged misrepresentations.**

Even if Plaintiff could somehow conjure an actionable representation, it cannot sustain its burden of demonstrating “justifiable reliance” on such a representation. Plaintiff’s sole owner and managing member, Glenn Mosell, graduated from U.C. San Diego with a bachelor’s degree in economics (Mosell: 10). He obtained a Series Six securities license and worked for Prudential-Bache, exploring a financial services stockbroker career (Mosell: 11). He also obtained real estate licenses in California and Colorado (Mosell: 11). He worked as a sales associate broker with Marcus and Millichap, a national firm dealing in investment sales (Mosell: 14). He then worked for Sperry Van Ness as an investment broker (Mosell: 15). He has worked on many million of dollars worth of transactions (Mosell: 19). He has also worked as a commercial real estate developer (Mosell: 23).

As a sophisticated businessman, Mosell simply had no right to rely on the handwritten statements set forth at Exhibit A. He is presumed to understand what a note is, if he really intended a simple loan and nothing more. He could have required a note or some other manifestation of the parties’ intent prior to advancing funds. For a sophisticated businessman to provide funds in the amounts at issue in reliance upon such a vague and flimsy basis as Exhibit A is not in any sense justifiable.

Reasonable reliance is measured objectively, yet consideration is given to certain subjective attributes of the individual, such as his or her sophistication. ‘One who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and that one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant.’ W. Page Keeton, Prosser and Keeton on Torts § 108, at 751 (5th ed. 1984).

*Stanley Weiss Assocs., LLC v. Energy Mgmt.*, 2004 R.I. Super. LEXIS 72 (R.I. Super. Ct. 2004).

Thus, to the extent that anything at all represented by John Berryhill in Exhibit A is false,

Plaintiff cannot show that it reasonably had any right or justifiable reasons for relying upon it.

**III. Plaintiff cannot sustain its burden to demonstrate a breach of any written contract.**

At Count One, Plaintiff states a claim for breach of a written contract, indicating that “Mosell Equities loaned money to John Berryhill<sup>5</sup> & Berryhill & Company, Inc., and they agreed to repay the debt as indicated in writing in **Exhibit A**” (emphasis in original) (Amended Complaint: ¶ 16). Again, Plaintiff misstates the actual language of Exhibit A. Nowhere does Exhibit A state that the “loan” will forever stay a loan, as in a demand note. Nowhere does Berryhill & Company, Inc., state that it will “repay the debt.” Instead, the terms of the actual writing, as confirmed by Glenn Mosell’s deposition testimony, indicate a temporary and interim “loan,” which “will be transitioned.” The document does not describe the parties’ intent in case the planned “transition” does not occur.

As a result, however, Plaintiff cannot demonstrate that Berryhill & Company, Inc., breached Exhibit A. Exhibit A simply sets forth no contractual duty that Defendant undertook, which it then failed to perform. Thus, Plaintiff fails to sustain its burden of demonstrating essential elements of its claim for breach of a written contract.

**III. Plaintiff cannot sustain its burden to demonstrate an implied-in-fact contract.**

At Count Two, Plaintiff states a claim for breach of an implied-in-fact contract. As Defendants have previously pointed out, the implied-in-fact contract is described in *Fox v. Mt. W. Elec.*, 137 Idaho 703 (2002):

---

<sup>5</sup> This Court has previously dismissed John Berryhill individually as a Defendant on this Count. Memorandum Decision and Order Regarding Defendants’ Second Motion to Dismiss and Motion to Strike Three Day Notice of Intent to Take Default of December 4, 2009.

‘An implied in fact contract is defined as one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other often being inferred from the circumstances attending the performance.’ *Farnworth v. Femling*, 125 Idaho 283, 287, 869 P.2d 1378, 1382 (1994) (citing *Clements v. Jungert*, 90 Idaho 143, 153, 408 P.2d 810, 815 (1965)). The implied-in-fact contract is grounded in the parties' agreement and tacit understanding. *Kennedy v. Forest*, 129 Idaho 584, 587, 930 P.2d 1026, 1029 (1997). ‘The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact.’ *Homes by Bell-Hi, Inc. v. Wood*, 110 Idaho 319, 321, 715 P.2d 989, 991 (1986) (citing *Clements v. Jungert*, 90 Idaho 143, 153, 408 P.2d 810, 815 (1965); *Bastian v. Gafford*, 98 Idaho 324, 325, 563 P.2d 48, 49 (1977)).

Idaho Code § 28-1-205(1) defines ‘course of dealing’ as ‘a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.’

137 Idaho at 708. As this reference makes clear, although the implied-in-fact contract is a separate category from an express contract, it nevertheless “is grounded in” the parties’ agreement and tacit understanding.

The parties’ agreement and tacit understanding is acknowledged by Glenn Mosell in his deposition testimony quoted above. The “loan” was meant as a temporary and interim step, not as a permanent lender-debtor relationship. Plaintiff’s failure to consummate the Moberry Venture entity, combined with its failure to realize the Polo Cove development project, does not give it any right now to recast the parties’ intent.

#### **IV. Plaintiff cannot sustain its burden for a claim of quasi contract or unjust enrichment.**

According to the Idaho Supreme Court,

in order to establish the prima facie case for unjust enrichment, the plaintiff must show that there was: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof.

*King v. Lang*, 136 Idaho 905, 910 (Idaho 2002), *citing*, *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88, 982 P.2d 917, 923 (1999), *citing*, *Curtis v. Becker*, 130 Idaho 378, 382, 941 P.2d 350, 354 (Ct. App. 1997).

In *King*, the Court sustained a district court's grant of summary judgment on this theory, explaining that it would not be inequitable for the defendants to retain any benefit, because the plaintiff was represented by a real estate agent in the real property transaction at issue and could not show that she justifiably relied on any alleged misrepresentations. Similarly, Plaintiff cannot show any *bona fide* inequity based on its own failure to require appropriate documents of indebtedness prior to advancing funds. Plaintiff cannot claim that its own business dealings with Berryhill & Company, Inc., were inequitable, when its agent, Glenn Mosell, possessed the superior financial experience and knowledge.

Moreover, not every benefit provided by a party, especially viewed in isolation, amounts to unjust enrichment. *See, e.g., Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001) ("An action for unjust enrichment does not lie simply because one party benefits from the efforts of others; instead, 'it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully") (citation omitted).

Accordingly, Plaintiff cannot sustain its burden to demonstrate the kinds of inequitable circumstances that would require Berryhill & Company, Inc., to disgorge the funds advanced to it pursuant to unjust enrichment.

**V. Plaintiff cannot sustain its burden of demonstrating conversion.**

Not every possession constitutes conversion. *See, e.g., Priel v. Heby*, 2004 NY Slip Op 50820U, 5 (N.Y. Sup. Ct. 2004) ("To properly plead a cause of action for conversion, it is incumbent upon plaintiff to allege facts establishing that he owned or had a superior right to the

materials in question, that he demanded their return, and that defendant refused to deliver them. . . . 'A conversion action cannot be predicated on an equitable interest or a mere breach of a contractual obligation') (citations omitted).

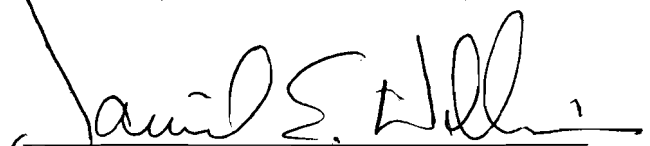
Here, Plaintiff will be unable to identify the claimed furniture and fixtures, to claim ownership, to state how that ownership arose, or to do anything else to attempt to justify its conclusory claims to relief.

### **CONCLUSION**

For all the foregoing reasons, Defendants respectfully request that the Court enter summary judgment in favor of them on all counts.

DATED this 22<sup>nd</sup> day of March, 2010.

THOMAS, WILLIAMS & PARK, LLP

  
Daniel E. Williams  
Attorney for Defendants

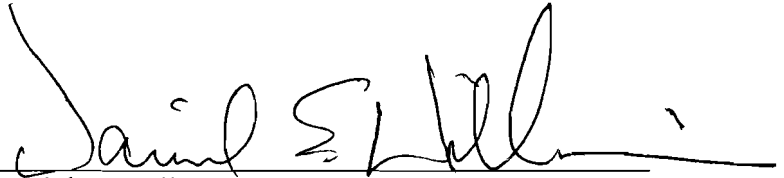


CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of March, 2010, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

         Via Hand Delivery  
✓ Via Facsimile: 939-7136  
✓ Via U.S. Mail

  
\_\_\_\_\_  
Daniel E. Williams

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 415

MAR 22 2010

J. DAVID NAVARRO, Clerk  
By P. BOURNE  
DEPUTY

### Attorneys for Defendants

## 000421

1. I am one of the Defendants in the above matter, the President of Defendant Berryhill & Company, Inc., and have personal knowledge of the facts stated herein.

2. In the summer of 2005, Glenn E. Mosell contacted me about building a restaurant within a development to be known as "Polo Cove."

3. For roughly three years, I devoted substantial amounts of time to the Polo Cove venture, meeting with architects, designers, potential vendors, vintners, hotel developers, county commissioners and others about the proposed restaurant, hotel and other parts of the development. I did so upon my understanding with Glenn Mosell, that Berryhill & Company, Inc., would participate in the Polo Cove profits beyond operation of the restaurant.

4. My business cards for Polo Cove, which were obtained and provided by Glenn Mosell, referred to me as a "Partner." A true and correct copy of this business card is attached hereto as Exhibit A.

5. As part of our joint effort, the restaurant operated by Berryhill & Company, Inc., moved to downtown Boise at the Plaza 121 location. Mr. Mosell encouraged the move, wanting to "splash the pot," that together we had "big things" to do. Throughout the construction of the new Berryhill restaurant, Mr. Mosell told me not to "cheap out," not to worry about the cost of the buildout, saying "go big" and "do it sexy."

6. I would not have agreed to the move downtown without Mosell's encouragement and promised financial support.

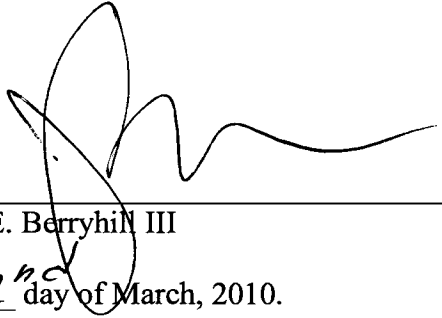
7. A large portion of the funds provided by Mr. Mosell went to the buildout of the new downtown space.

8. Mr. Mosell signed a letter of intent with the Plaza 121 landlord for additional space near the restaurant for a Polo Cove showroom, although I warned him it was too big and would significantly increase ongoing liabilities. Mr. Mosell responded that I was not looking at "the big picture." Mr. Mosell said he could use the space for Polo Cove promotions during the day and Berryhill & Company, Inc., could use it for banquets and receptions in the evening.

9. Although Mosell paid rent for a time for this area, he did not cover the Polo Cove portion of the buildout of the space. In approximately late summer, 2008, Mosell discontinued paying rent altogether

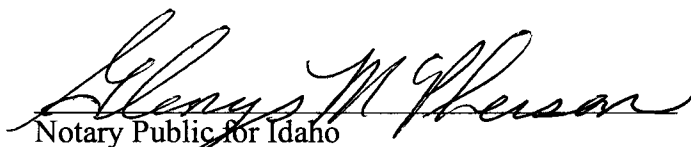
10. Berryhill & Company, Inc., is still paying rent on this additional space.

11. In answer to discovery requests, Berryhill & Company, Inc., has identified approximately \$927,415 in costs associated with the move of the restaurant downtown, expansion space including the Polo Cove showroom, other Polo Cove-related expenses, and ongoing rent obligations.

  
\_\_\_\_\_  
John E. Berryhill III

Subscribed and sworn to before me this 22<sup>nd</sup> day of March, 2010.



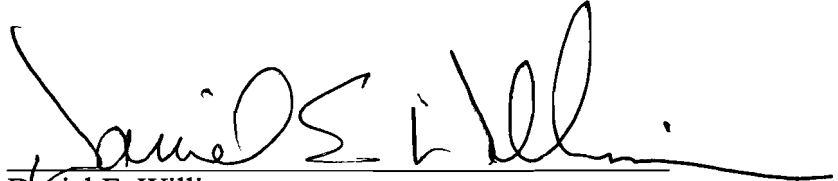
  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at Boise, Idaho  
My Commission Expires: 11-7-12

CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of March, 2010, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail

  
\_\_\_\_\_  
Daniel E. Williams



121 NORTH 9TH STREET  
SUITE 101  
BOISE, IDAHO 83702

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Partner

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**ORIGINAL**

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:15

**MAR 22 2010**

J. DAVID NAVARRO, Clerk  
By R. BOURNE  
DEPUTY

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
**121 N. 9<sup>th</sup> St., Suite 300**  
**P. O. Box 1776**  
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**Telephone (208) 345-7800**  
**Fax: (208) 345-7894**  
**danw@twplegal.com**

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,  
Liability Company,**

**Plaintiff,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**AFFIDAVIT OF  
DANIEL E. WILLIAMS RE:  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

STATE OF IDAHO )  
 )ss.  
County of Ada )

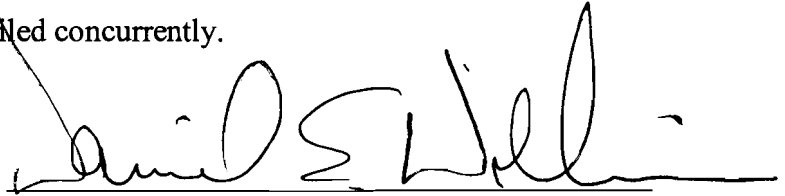
DANIEL E. WILLIAMS, being first duly sworn on oath, deposes and says:

AFFIDAVIT OF DANIEL E. WILLIAMS RE: DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT, P. 1

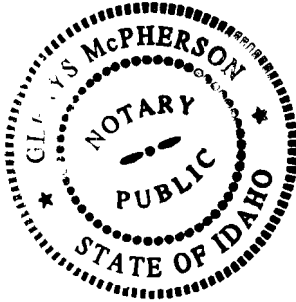
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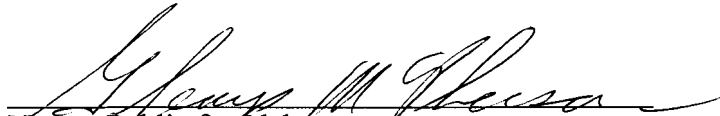
1. I am the attorney for Defendants in the above matter.

2. Attached hereto as Exhibit "A" are the excerpts from the Deposition of Glenn E. Mosell taken February 5, 2008, which have been referred to in Defendants' Memorandum in Support of Motion for Summary Judgment filed concurrently.

  
Daniel E. Williams

Subscribed and sworn to before me this 22<sup>nd</sup> day of March, 2010.



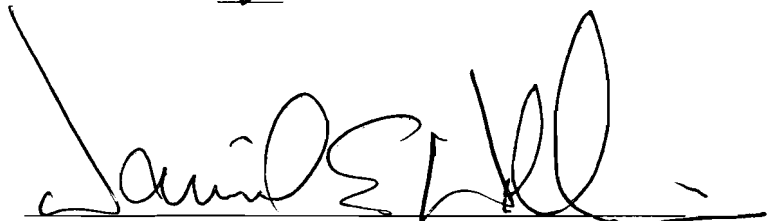
  
Notary Public for Idaho  
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My Commission Expires: 11-7-12

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Daniel E. Williams

AFFIDAVIT OF DANIEL E. WILLIAMS RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, P. 2



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN BERRYHILL, an individual, )  
and MOSELL EQUITIES, L.L.C., an )  
Idaho limited liability )  
company, )

Plaintiffs, )

vs. )

Case No. CV OC  
07-00987

BROADWAY PARK, INC., an Idaho )  
corporation, and MICHAEL G. )  
MATZEK, an individual, )

Defendants. )  
----- )

DEPOSITION OF GLENN E. MOSELL

FEBRUARY 5, 2008

BOISE, IDAHO

BURNHAM, HABEL & ASSOCIATES, INC.

Certified Shorthand Reporters

**COPY**  
Prepared for

Reported By

Mr. Charney

Post Office Box 835  
Boise, Idaho 83701

Debra Burnham,  
CSR, RPR

(208) 345-5700 • FAX 345-6374 • 1-800-867-5701

# DEPOSITION OF GLENN E. MOSELL TAKEN 2-5-08

SHEET 1 PAGE 1

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN BERRYHILL, an individual, )  
and MOSELL EQUITIES, L.L.C., an )  
Idaho limited liability )  
company, )

Plaintiffs, )

vs. )

Case No. CV OC  
07-00987

BROADWAY PARK, INC., an Idaho )  
corporation, and MICHAEL G. )  
MATZEK, an individual, )

Defendants. )

DEPOSITION OF GLENN E. MOSELL

FEBRUARY 5, 2008

BOISE, IDAHO

PAGE 3

I N D E X

E X A M I N A T I O N

GLENN E. MOSELL  
By: Mr. Roe

PAGE  
4

E X H I B I T S

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3

PAGE 2

DEPOSITION OF GLENN E. MOSELL

BE IT REMEMBERED that the deposition of Glenn E. Mosell was taken by the Defendants/Counterclaimants Michael G. Matzek and Broadway Park, Inc., at the offices of Moffatt, Thomas, Barrett, Rock & Fields, Chartered, located at 101 South Capitol Boulevard, 10th Floor, Boise, Idaho, before Debra Burnham, a court reporter and notary public in and for the County of Ada, State of Idaho, on Tuesday, the 5th day of February, 2008, commencing at the hour of 10:00 a.m. in the above-entitled matter.

## APPEARANCES:

For the Plaintiffs/  
Counterdefendants  
John Berryhill and  
Mosell Equities,  
L.L.C.: CHARNEY AND ASSOCIATES, PLLC  
By: Mr. Dennis M. Charney  
1191 East Iron Eagle Drive  
Eagle, Idaho 83616

For the Defendants/  
Counterclaimants  
Michael G. Matzek and  
Broadway Park, Inc.: MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
Mr. Michael O. Roe  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701

Also Present: Mr. Berryhill  
Mr. Matzek

2

PAGE 4

1 Whereupon the deposition proceeded as follows:  
2 GLENN E. MOSELL,  
3 a witness having been first duly sworn to tell the  
4 truth, testified as follows:

## EXAMINATION

6 BY MR. ROE

7 Q. Hello, Mr. Mosell. How are you?

8 A. I am good. How are you?

9 Q. Good. Will you please state your name and  
10 address for the record, please, and spell your last  
11 name?

12 A. Glenn -- G-L-E-N-N -- initial E, Mosell;  
13 M-O-S-E-L-L, 2233 North Aldercrest; Eagle, Idaho.

14 Q. And how long have you resided at that address?

15 A. About five years.

16 (Whereupon exhibit 1 was marked for  
17 identification.)

18 Q. (BY MR. ROE) Mr. Mosell, I'm going to hand  
19 you a document that's been marked as exhibit 1, and ask  
20 you if you're familiar with that document.

21 A. Yes.

22 Q. Have you seen that before?

23 A. Yes.

24 Q. Is that the subpoena duces tecum pursuant to  
25 which you're appearing today?

4

SHEET 2 PAGE 9

1 **Q. Let's throw some dates in there, Mr. Mosell.**  
 2 **Please tell me when you were born.**  
 3 A. I was born in 1963, graduated from high school  
 4 1981.  
 5 **Q. Go ahead. Thanks.**  
 6 A. 1982 I went to Orange Coast College. Again  
 7 lived in Newport Beach for one year. I put myself  
 8 through college, worked my way through college; worked  
 9 in restaurants as a waiter and manager. Again, one year  
 10 in Newport Beach; Orange Coast College. Moved to San  
 11 Diego. Went for one year to San Diego State, was  
 12 pre-business, San Diego State. The following year I  
 13 went to UC San Diego; University of California San Diego  
 14 for two years and one quarter, and graduated with an  
 15 economics degree in 1985; bachelor's in economics.  
 16 **Q. Let me stop you, Mr. Mosell. What did you**  
 17 **study at Orange Coast?**  
 18 A. General education.  
 19 **Q. And did you receive a degree from there?**  
 20 A. No; one year.  
 21 **Q. You said you worked your way through college.**  
 22 **Was that exclusively in restaurants or did you work in**  
 23 **any other business capacity, real estate related**  
 24 **occupations?**  
 25 A. All through college?

9

PAGE 10

1 **Q. Yes.**  
 2 A. Predominantly restaurants. I worked briefly  
 3 scuba diving, cleaning boat bottoms in Newport Beach.  
 4 Worked in San Diego for Centro, which was a genetic  
 5 biotech research firm, as a research assistant while  
 6 attending UCSD. That's where I first learned an  
 7 amoeba's much like development.  
 8 **Q. Good. So you graduated from San Diego State?**  
 9 A. No. I attended one year at San Diego State.  
 10 Then my final two years and one quarter were at  
 11 University of California San Diego, which is located in  
 12 La Jolla.  
 13 **Q. UC San Diego?**  
 14 A. Yes.  
 15 **Q. What year did you graduate?**  
 16 A. 1985.  
 17 **Q. Your degree was in economics?**  
 18 A. Bachelor's in economics, yes.  
 19 **Q. Great. Do you have any postgraduate degrees?**  
 20 A. I do not.  
 21 **Q. Tell me about any training or certifications**  
 22 **that you received after your college degree in 1985,**  
 23 **please.**  
 24 A. Well, I traveled a bit after graduation.  
 25 Traveled to Japan, spent the summer there. Entertained

10

PAGE 11

1 the notion of a trading company, Japan/US import-export.  
 2 I later, in 1987, went to work for Prudential and  
 3 Prudential-Bache -- B-A-C-H-E -- and explored a  
 4 financial services stockbroker career. I do have a  
 5 Series Six securities license from that time frame, and  
 6 an insurance license.  
 7 **Q. Are those active or inactive?**  
 8 A. I don't know that they ever expire, but  
 9 haven't practiced since.  
 10 **Q. So I appreciate that information, but my**  
 11 **original question was any certifications or training**  
 12 **after your graduation in 1985; and your response to that**  
 13 **question would be the Series Six securities license and**  
 14 **an insurance license?**  
 15 A. Um-hmm.  
 16 **Q. Is that "yes," sir?**  
 17 A. Yes.  
 18 **Q. Anything else besides those two?**  
 19 A. In 1988 I received my real estate license.  
 20 The first was an agent's license. I later received my  
 21 California broker's license.  
 22 **Q. What is the status of those two designations?**  
 23 A. Inactive.  
 24 **Q. Any other certifications or designations?**  
 25 A. I have a Colorado real estate broker's

11

PAGE 12

1 license.  
 2 **Q. And the status of that license?**  
 3 A. Inactive.  
 4 **Q. Anything else?**  
 5 A. I believe that's it.  
 6 **Q. With respect to those five certifications;**  
 7 **i.e., the securities license, the insurance license and**  
 8 **the three real estate licenses, were you ever the**  
 9 **subject of an investigation, complaint or inquiry by a**  
 10 **governing agency?**  
 11 A. Well, you mentioned a lawsuit in San Diego in  
 12 one of your previous inquiries. And that occurred while  
 13 I was employed by Sperry Van Ness, so would you like me  
 14 to go back and talk about how I went into the real  
 15 estate business or go right to that lawsuit?  
 16 **Q. I am going to come back to your employment**  
 17 **history. The question was any investigations, inquiry**  
 18 **or complaints by a regulatory agency with authority over**  
 19 **one of those five licenses that you mentioned.**  
 20 A. Answer would be no.  
 21 **Q. No. All right. Now, you started to tell me**  
 22 **about a lawsuit. Did that -- Was that -- Were those**  
 23 **private parties or was that brought by a state agency?**  
 24 A. Private parties.  
 25 **Q. We will come back to that. So your answer is,**

12

PAGE 13

1 with respect to your professional or occupational  
2 licenses, you have not been the subject of an  
3 investigation or inquiry, to your knowledge?

4 A. Correct.

5 Q. Have you ever been convicted of a felony?

6 A. No.

7 Q. Ever been charged with a felony?

8 A. No.

9 Q. Are you married?

10 A. Yes, sir.

11 Q. What is your wife's name?

12 A. Mikki -- M-I-K-K-I -- Mosell.

13 Q. What is her middle name?

14 A. Ann.

15 Q. What was her maiden name?

16 A. Marsh; M-A-R-S-H.

17 Q. And do you have any children?

18 A. Yes; three.

19 Q. What are their names and ages?

20 A. Bradley is 15. Kylie -- K-Y-L-I-E -- is 14.

21 Tamber -- T-A-M-B-E-R is 10.

22 Q. And do they all live with you and your wife?

23 A. Yes.

24 Q. How long have you and your wife been married?

25 A. Since 1988.

13

PAGE 15

1 properties; so I joined that firm in the end of '88.

2 I worked for Marcus and Millichap for roughly  
3 two years, did extremely well. Sold investment  
4 properties ranging from apartment buildings, retail  
5 centers, industrial parks, self-storage facilities,  
6 mobile home parks. Did extremely well. Moved to a  
7 competing firm, Sperry Van Ness, based out of Newport  
8 Beach, that had a similar profile; strictly investment  
9 sales. And I was the first Sperry Van Ness broker in  
10 San Diego. I opened that office. Again, did quite well  
11 as a young investment broker.

12 And in '92 moved to Boulder, Colorado. I  
13 continued to broker properties independently. Mosell  
14 and Associates or Mosell and Company. Also formed  
15 Mosell Development LLC. Purchased land on my own  
16 account, properties on my own account; entitled, sold,  
17 bought and sold properties, and have been continuing  
18 that activity since '92.

19 Q. Mr. Mosell, who was your direct supervisor at  
20 Marcus and Millichap?

21 A. Joel Tornebeni.

22 Q. Would you spell that last name, please.

23 A. T-O-R-N-E-B-E-N-I, I guess.

24 Q. Did you leave Marcus and Millichap on good  
25 terms?

15

PAGE 14

1 Q. Where were you married?

2 A. San Diego.

3 Q. Where is your wife from?

4 A. Born in North Dakota, grew up in San Diego.

5 Q. Had she ever lived in Idaho before she moved  
6 here with you?

7 A. Never.

8 Q. Does she have relatives in Idaho at this  
9 point?

10 A. No. Well, excuse me. Her parents moved to  
11 Idaho. They followed us up in 2003, I believe.

12 Q. What are her parents' names?

13 A. Darrell -- D-A-R-R-E-L-L -- Marsh and Patricia  
14 Marsh.

15 Q. Now, if we can, would you please give me just  
16 a sketch of your employment, professional history. I  
17 think you started to do this a moment ago, but please  
18 fill in those gaps.

19 A. In 1988, end of '88 I joined Marcus and  
20 Millichap as a sales associate broker. Marcus and  
21 Millichap is a national firm, strictly investment sales.  
22 They market properties, income-producing properties of  
23 one million to ten million, is really their bread and  
24 butter. The La Jolla office was roughly 30 professional  
25 full-time brokers, selling only income-producing

14

PAGE 16

1 A. Absolutely.

2 Q. And you moved to the Sperry Van Ness office in  
3 1990; is that right? Or you opened that office?

4 A. Correct.

5 Q. Were you the only broker in that office?

6 A. I was the first broker. It immediately became  
7 a 25- to 30-man office.

8 Q. Did you manage that office?

9 A. I did not manage the office.

10 Q. Who did you report to there?

11 A. Roger Grove, Mark Van Ness, Rand Sperry.

12 Q. You left in 1992?

13 A. Yes.

14 Q. And did you leave under good terms? Or what  
15 were the circumstances of your departure?

16 A. Absolutely. I decided to move on and went  
17 independent, and that same year in '92 moved to Boulder,  
18 Colorado.

19 Q. Why Colorado?

20 A. There was a bit of a commercial real estate  
21 downturn in Southern California at that time. I was  
22 introduced to Colorado by a good friend and client that  
23 introduced me to Telluride. We considered moving to  
24 Telluride; actually bought real estate in Telluride, but  
25 then explored Colorado and found opportunity and decided

16

1 to move to Boulder instead.  
 2 **Q. So the answer is, you just liked the area or**  
 3 **was it for the development opportunity or both?**  
 4 A. Both. It was definitely a quality of life and  
 5 business opportunity.  
 6 **Q. And you moved to Boulder in '92; is that**  
 7 **right?**  
 8 A. Correct.  
 9 **Q. And how long did you stay in Boulder?**  
 10 A. We remodeled a home on the river and lived  
 11 there for about two years and then moved to Niwot --  
 12 N-I-W-O-T -- just outside of Boulder, and lived there  
 13 until 1998.  
 14 **Q. And how long did you stay in Colorado?**  
 15 A. Until 1998.  
 16 **Q. Is that when you moved to Eagle?**  
 17 A. We actually considered moving back to San  
 18 Diego full time, and we went back to San Diego in '98 to  
 19 put a toe back in the water, decided there were too many  
 20 people in California and considered moving back to  
 21 Colorado, but then looked to the Pacific Northwest and  
 22 evaluated locations up here, and then moved to Eagle in  
 23 2000.  
 24 **Q. So you lived back in San Diego from '98 to**  
 25 **2000?**

17

1 A. Correct.  
 2 **Q. What did you do during that time?**  
 3 A. I dabbled in brokerage a bit as an  
 4 independent, not in California but on a national level.  
 5 I have relationships that utilize my services on a  
 6 national level.  
 7 **Q. Please elaborate on these relationships that**  
 8 **utilize your services on a national level. Who are they**  
 9 **and what type of services do you provide?**  
 10 A. I mentioned that I brokered self-storage  
 11 facilities and mobile home communities. I actually  
 12 represented some large syndications in the purchase of  
 13 self-storage and mobile home communities, and they were  
 14 buyers on a national level; so I would represent them in  
 15 those purchases.  
 16 **Q. During this period from 1998 to 2000?**  
 17 A. There were a few transactions during that time  
 18 period, yes.  
 19 **Q. Who were the principals of these syndications?**  
 20 A. Mark Coleman was one primary purchaser of the  
 21 syndication. He runs a large investment firm out of  
 22 Vancouver, British Columbia.  
 23 **Q. Could you spell Mr. Coleman's last name,**  
 24 **please.**  
 25 A. C-O-L-E-M-A-N.

18

1 **Q. And he's based in Vancouver?**  
 2 A. Yes.  
 3 **Q. What is the name of his company, if he has**  
 4 **one?**  
 5 A. May have been Coleman Properties.  
 6 **Q. Who else did you work for during that '98 to**  
 7 **2000 period besides Mr. Coleman, for or with?**  
 8 A. Well, let's see. Berle Boswell out of Bossier  
 9 City, Louisiana. Probably did ten million dollars'  
 10 worth of transactions with Berle during that time  
 11 period. He bought, sold, refinanced mobile home parks,  
 12 self-storage facilities; refinanced a single-tenant  
 13 retail building. It was a Sports Authority in Bossier  
 14 City, Louisiana. It was a five-million-dollar  
 15 transaction.  
 16 **Q. Besides Mr. Coleman and Mr. Boswell, who else?**  
 17 A. During that time period those would be primary  
 18 clients. There were Chris Komoto was -- Excuse me.  
 19 That wasn't during that time period.  
 20 **Q. Let's expand the time period, then, back prior**  
 21 **to 2000; and I'm trying to get a feel of your experience**  
 22 **with commercial real estate. So that's the sort of**  
 23 **thrust of my questions.**  
 24 A. Again, through Marcus and Millichap and Sperry  
 25 Van Ness there were dozens of transactions, so I

19

1 apologize; that was 20 years ago.  
 2 **Q. That was the '88-to-'92 period, right?**  
 3 A. Correct.  
 4 **Q. If we can, let's focus on '92 to '98, that**  
 5 **six-year period. What were you doing then?**  
 6 A. Well, again, I predominantly bought and sold  
 7 properties on my own account. I purchased a property  
 8 outside of Longmont, Colorado, annexed it to the city of  
 9 Longmont; rezoned, subdivided, brought utilities in.  
 10 And that was my primary activity in Colorado. I  
 11 represented Engle Homes as a consultant. They were a  
 12 production homebuilder looking to enter the Longmont  
 13 market, and I did some consulting for them.  
 14 **Q. Spell that, please; what homes?**  
 15 A. E-N-G-L-E Homes out of -- They're based out of  
 16 Florida, but then a production homebuilder out of  
 17 Denver.  
 18 **Q. So the Longmont project: How did you refer to**  
 19 **that, the property that you had entitled and subdivided?**  
 20 A. How did I refer to it?  
 21 **Q. Yeah. Was it the --**  
 22 A. Sugar Mill Village.  
 23 **Q. Sugar Mill Village?**  
 24 A. Uh-huh.  
 25 **Q. How long did you work on it?**

20

PAGE 21

1 A. I'm sorry; it was Mill Village.  
 2 Q. Mill Village? How long did you work on the  
 3 Mill Village project?  
 4 A. From '94 to '98.  
 5 Q. And was that project successful?  
 6 A. Yes. It was. It had some delays to it. I  
 7 had some partners that I eventually sold out to, to  
 8 complete the project.  
 9 Q. Why did you sell out to those partners?  
 10 A. The project was a little ahead of its time.  
 11 And to allow them to move forward with the project, we  
 12 had differences of opinions; so I let them move forward.  
 13 Q. I'm sorry. You referred to it as the Mill  
 14 Valley project?  
 15 A. Mill Village.  
 16 Q. Mill Village project. Describe briefly the  
 17 Mill Village project.  
 18 A. It began as an 80-acre mixed use PUD that had  
 19 a neotraditional residential component and a village  
 20 town center, also an industrial component that -- I  
 21 brought GT Bicycles in as our first tenant. We brought  
 22 the road and utilities in for GT Bicycles.  
 23 Q. Please give me an idea of the amount of money  
 24 and the value involved. How big a deal was it?  
 25 A. The -- It had a hundred-some single-family

21

PAGE 22

1 homesites, had roughly 40 acres of commercial and  
 2 industrial. Had multifamily component, 15 acres, 200  
 3 units? And again, I took it through the entitlement  
 4 process on my own and then we eventually sold the paper,  
 5 platted.  
 6 Q. Who were your partners in that project?  
 7 A. I only had Roger Pomaineville as one partner.  
 8 Q. Will you spell that, please.  
 9 A. P-O-M-A-I-N-E-V-I-L-L-E.  
 10 Q. So he was your only partner in that deal?  
 11 A. Originally he was not my partner. He later  
 12 bought into the project.  
 13 Q. Who were your partners prior to that?  
 14 A. None.  
 15 Q. You said that you had some differences of  
 16 opinion. Remember that?  
 17 A. Um-hmm.  
 18 Q. Who were the differences of opinion with?  
 19 A. Roger.  
 20 Q. What were they about?  
 21 A. The sale of the homesites to a homebuilder  
 22 that wanted to modify the neotraditional character that  
 23 was planned and approved. Basically allowing a  
 24 homebuilder to move the garages forward, for example,  
 25 versus having them set back away from the street. That

22

PAGE 23

1 was the primary consideration. There were some delays  
 2 with the city over road realignment and sewer access, so  
 3 there was pressure to modify the concept plan to move  
 4 forward.  
 5 Q. To accommodate the city's request?  
 6 A. No. The delays just gave incentive to then  
 7 sell quickly rather than hold the course with the design  
 8 that we had originally come up with.  
 9 Q. Mr. Mosell, your testimony was originally,  
 10 with respect to this Mill project, that you were the  
 11 sole owner/developer; is that correct?  
 12 A. I started the project as the sole  
 13 owner/developer of the project.  
 14 Q. And how long did you proceed as the sole  
 15 owner?  
 16 A. First year and a half.  
 17 Q. So a year and a half into the project you sold  
 18 an interest to Mr. -- is it Pomaineville?  
 19 A. Pomaineville.  
 20 Q. Is that correct?  
 21 A. Correct.  
 22 Q. And what percentage of the project did you  
 23 sell to him?  
 24 A. Fifty percent for \$600,000.  
 25 Q. That was about 18 months into the project,

23

PAGE 24

1 correct?  
 2 A. Correct.  
 3 Q. How much longer after that was it before he  
 4 bought you out completely?  
 5 A. Well, it would have been '98.  
 6 Q. Well, you were the sole owner for 18 months,  
 7 right?  
 8 A. Yes.  
 9 Q. And at the 18-month point Roger bought fifty  
 10 percent, right?  
 11 A. Correct.  
 12 Q. How many months after that 18-month point did  
 13 he buy the remainder of the project from you?  
 14 A. We financed much of the property over the  
 15 course of -- between, say, '95 and '98. That happened  
 16 in '95; so it would be a three-year period that equity  
 17 was pulled out of that property over that three-year  
 18 period. That was the basis of my buyout at that point.  
 19 Q. Just so I understand it, after Roger bought in  
 20 a year and a half into the project, he had bought you  
 21 out completely over the next 36 months?  
 22 A. Correct. And basically I realized the other  
 23 half of my profit over that three-year period through  
 24 sales and financing of the project. Roger then assumed  
 25 all of that debt in 1998 to complete his purchase. So I

24

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1 Q. Is that one to two million?

2 A. No; it was 1.2 million.

3 Q. Okay. And these were small industrial sites?

4 A. Multitenant industrial park, or there was  
5 another mixed-use office over retail, and also apartment  
6 over retail; small properties that I personally had  
7 listings of. There were multiple properties listed by  
8 the company that we were aware of, or maybe presented an  
9 offer on that property but the offer wasn't accepted.

10 Q. Well, I appreciate that, Mr. Mosell; but I'm  
11 less concerned about properties that maybe Sperry Van  
12 Ness or Marcus Millichap listed. I'm talking about your  
13 experience, if we could focus on that, please.

14 A. That is part of my experience. When you're  
15 representing a buyer to purchase a property, whether  
16 it's your listing or not, that is part of that  
17 experience.

18 Q. Okay.

19 A. So --

20 Q. That's fair. So if -- My question is: Please  
21 give me a full description, a full and complete  
22 description of your experience and background with  
23 multitenant shopping centers. That was the question.  
24 Right?

25 A. Um-hmm. Yes.

37

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1 you two met and how you've been involved; and then I'll  
2 come back and try to fill in some gaps, please.

3 A. In 2005 I -- Mosell Equities secured a  
4 purchase of a vineyard on Homedale Road, and then went  
5 under contract on several adjacent properties to that  
6 vineyard. My vision to build a restaurant in the Idaho  
7 wine country on that site prompted me to contact John  
8 Berryhill for the first time. He was actually my first  
9 choice as the celebrity chef in town with the right  
10 flair, to anchor my wine country restaurant idea.

11 I gave him a call. It was a couple of weeks  
12 before he called me back. Apparently developers call  
13 John all the time wanting him to open a new restaurant  
14 here or there. The reason he called me back was because  
15 it was the wine country notion that intrigued him. He  
16 didn't know me at the time. We met. I took him out to  
17 the property that same day. He said he was in. He was  
18 interested, wanted to be a part of it. Since then we've  
19 become good friends and business partners. I've  
20 purchased or have agreed to purchase fifty percent of  
21 his restaurant and catering operations. I've made  
22 payment in the form of a loan to Berryhill and Company;  
23 and as we work with our tax attorneys and consultants to  
24 structure the right entity for partnership, we'll move  
25 forward with Berryhill and Company.

39

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1 Q. And you mentioned one, the Glass House  
2 Square --

3 A. Yes.

4 Q. -- in San Diego?

5 A. Yes.

6 Q. That was one example. Can you give me,  
7 starting with those examples that are most similar to  
8 the Broadway Park Shopping Center, can you give me any  
9 others, please?

10 A. Other than evaluation of many strip centers  
11 that were in the Marcus and Millichap or Sperry Van Ness  
12 network, I did not specialize as a retail person. My  
13 specialization evolved to -- In the beginning it was  
14 apartment sales; fifty, hundred, two hundred-unit  
15 apartment projects. Later, self-storage and  
16 manufactured home communities and large-scale  
17 communities of one hundred, two hundred, three  
18 hundred-unit communities were my specialty.

19 Q. Thank you.

20 Mr. Mosell, let's shift gears a little bit, if  
21 we may; and I'd like to ask you a series of questions  
22 about your relationship and history with John Berryhill.  
23 Okay?

24 A. Okay.

25 Q. Tell me -- Just give me a chronology of when

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1 Do you want me to talk about moving the  
2 restaurant downtown or hold off on that?

3 Q. Thanks. We'll get to that. Let me just make  
4 sure I understand. So you testified about you securing  
5 a vineyard on Homedale Road, and I assume that's the  
6 concept or vision that eventually became known as Polo  
7 Cove?

8 A. It was the beginning of Polo Cove, yes.

9 Q. That was in 2005, right?

10 A. Correct.

11 Q. Can you give me a month, please.

12 A. I believe it was April of 2005 that I first  
13 contracted.

14 Q. Do you remember who the selling party was on  
15 that vineyard?

16 A. That would have been Mr. Ellenburg, a dentist  
17 in Anchorage, Alaska. He was represented by Prudential  
18 Jensen Realty; Steve Jensen, broker, Kathy Smith,  
19 Realtor agent.

20 Q. And after you secured that property and, I  
21 think, some adjacent property, or at least secured  
22 contracts or options to purchase the property, you  
23 contacted Mr. Berryhill; is that correct?

24 A. Correct.

25 Q. Do you remember when you first contacted Mr.

40

1 Berryhill?

2 A. It was that summer. I do not recall which  
3 month.

4 Q. So the summer of 2005?

5 A. Yes.

6 Q. And in between the summer of 2005 and the  
7 summer of 2006 when you -- your company and Mr.  
8 Berryhill entered into the contract to purchase Broadway  
9 Park Shopping Center, tell me about the evolution of  
10 your relationship with Mr. Berryhill relative to his  
11 restaurant and Polo Cove, if you would, please. So  
12 we're talking that time period summer of '05 to summer  
13 of '06, but not getting into Broadway Park yet.

14 A. Again, John as a restaurateur, we looked to  
15 him as a consultant to design a wine country restaurant;  
16 seating, layout. Worked with Sherry McKibben,  
17 architect; also Andy Erstad and Ken Reed, architects.  
18 And we have now a restaurant designed for Polo Cove.

19 Q. Okay. Again, though, with respect to that  
20 period of time from the summer of '05 to the summer of  
21 '06, tell me about what it is that you wanted from and  
22 offered to Mr. Berryhill and vice versa. And again,  
23 obviously, as you know, it becomes important for this  
24 lawsuit; but I want to understand that background,  
25 please.

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1 A. I was tapping into his expertise, using him as  
2 a consultant to design a wine country restaurant. That  
3 was the focus of our relationship. We discussed further  
4 involvement in the Polo Cove project beyond just being a  
5 restaurateur. So there is value that if a restaurant is  
6 built in a vineyard, the surrounding property's value is  
7 enhanced. I introduced that concept to John, that he  
8 could then participate in some of those profits beyond  
9 daily restaurant operation and cash flow.

10 Q. Do you mean by that that Mr. Berryhill would  
11 purchase land around the restaurant or in the project in  
12 general, and that land would appreciate in value and  
13 thereby accrue to his benefit?

14 A. No.

15 Q. Okay.

16 A. That merely by him branding the restaurant,  
17 overseeing those operations, with really no need for him  
18 to invest his own monies in that real estate, that he  
19 would enhance the value of the surrounding vineyard and  
20 uses. Selling a homesite in the boonies without any  
21 services around it is different than selling a homesite  
22 walking distance to a wine country restaurant. So we  
23 discussed ways of compensating John Berryhill for his  
24 talents, his culinary talents, his name recognition, his  
25 personality and flair as a restaurateur. It was not

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1 required that he build the restaurant himself or invest  
2 monies to participate in that enhancement of value to  
3 real estate.

4 We then discussed during that time period,  
5 time allocation of his services. If I take him from his  
6 catering and downtown restaurant efforts out to Polo  
7 Cove, what would the compensation formula be; how much  
8 time would he have to dedicate to Polo Cove versus his  
9 downtown restaurant endeavors? That was the evolution  
10 of which it made sense for me to buy into Berryhill and  
11 Company so that there was no competing activity. It's  
12 all blended, that Mosell business into Berryhill. We  
13 talked about Moberry Ventures as that entity, and that  
14 entity would operate a restaurant downtown; would  
15 operate a restaurant at Polo Cove. And we'd operate  
16 catering businesses around the valley, services.

17 Q. Well, let me ask you to please follow up on  
18 that, 'cause I think I understand you correctly, that  
19 Mr. Berryhill had his name recognition and his flair and  
20 his culinary talents to offer to Polo Cove, right?

21 A. Correct.

22 Q. Although it doesn't sound like you  
23 contemplated his, Mr. Berryhill's, that is, direct  
24 investment in Polo Cove; you wanted to compensate him  
25 somehow --

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1 A. Correct.

2 Q. -- is that correct, for his time?

3 A. Correct.

4 Q. And in order to eliminate any competition, as  
5 you put it, or tension between his various activities,  
6 you undertook some sort of blending of operations; is  
7 that right?

8 A. Exactly.

9 Q. Please describe for me the contracts and legal  
10 agreements that memorialize that blending, please, and  
11 that relationship.

12 A. Trout Jones had put together documents for  
13 Moberry Ventures, Inc., that we never finalized.

14 Q. Why were they not finalized?

15 A. Our focus was opening the restaurant downtown  
16 at the Plaza 121 during the second half of 2006, and we  
17 just haven't gotten to finalization of that Moberry  
18 entity. In lieu of my purchasing equity, I have loaned  
19 Berryhill and Company \$385,000.

20 Q. Mr. Mosell, you said in lieu of the purchase  
21 of equity you have loaned Berryhill \$385,000. Do you  
22 mean that as a permanent substitute or is that an  
23 interim?

24 A. Interim substitute.

25 Q. Well, going back to my last question, I asked

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1 figures. And I know that there was profit of --  
2 although minimal because of the moving expenses and  
3 settling in, and let's say inefficiencies of the new  
4 labor, ramping up the business -- that it was  
5 profitable; not as profitable as we will be fourth  
6 quarter of this year.

7 **Q. But is it your testimony, Mr. Mosell, that the**  
8 **Berryhill operations have been profitable each month**  
9 **since September '07, running through January '08?**

10 A. If you take out the nonrecurring expenses of  
11 the move and the tenant improvements; absolutely, yes.

12 **Q. How will those profits be divided between you**  
13 **and Mr. Berryhill? In rough numbers let's say there was**  
14 **a three-million-dollar year, and profit was ten percent**  
15 **of that, three hundred thousand.**

16 A. We would split that \$300,000 profit  
17 fifty-fifty.

18 **Q. That's the deal?**

19 A. That would be our understanding.

20 **Q. Well, with respect to the 385,000 that you've**  
21 **already loaned Berryhill, is he paying interest on that?**  
22 **Or what are the terms of that loan?**

23 A. No details, no formal note has been put  
24 together. Right now if I decided not to be a part of  
25 Berryhill and Company, we could separate and I could say

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1 A. Not since last summer. And again, we haven't  
2 focused on that.

3 **Q. If you and Mr. Berryhill had drafts of these**  
4 **documents since last summer, why haven't you finalized**  
5 **them?**

6 A. I've been quite busy with Polo Cove. John's  
7 been quite busy opening a new restaurant. There's an  
8 element of trust moving forward, and that's where we're  
9 at.

10 **Q. Mr. Mosell, is it your understanding today**  
11 **that if -- you have the absolute right to walk away from**  
12 **the restaurant, demand your 385,000 back?**

13 A. Yes.

14 **Q. Is that correct?**

15 A. Yes. That would not relieve me of my  
16 obligation on cosigning of that space, though.

17 **Q. So is it your intent today to go forward with**  
18 **the purchase of fifty percent of the Berryhill**  
19 **operations?**

20 A. That is my intent, yes.

21 **Q. But you have the absolute right to walk away**  
22 **from that intent if you chose to?**

23 A. Yes.

24 **Q. If you've had the drafts of this Moberry**  
25 **Ventures, Inc., company since last summer and you and**

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1 "Give me back \$385,000 and we'll go our separate ways."  
2 Right now we're moving forward with that  
3 understanding. The same could be said about Polo Cove.

4 **Q. I'm sorry. What do you mean with respect to**  
5 **Polo Cove?**

6 A. We have no contractual arrangement on Polo  
7 Cove. We have no contractual arrangement with Berryhill  
8 and Company at this point. No contract exists.

9 **Q. With respect to your relationship or that of**  
10 **Mosell Equities to the Berryhill restaurant and catering**  
11 **operations, your testimony is that there are no**  
12 **documents; they just haven't been done yet. Right?**

13 A. There were articles written for Moberry  
14 Ventures. We have not signed any of those documents.

15 **Q. Moberry Ventures, Inc.: Was that going to be**  
16 **an S corp?**

17 A. Yes.

18 **Q. Has it been organized with the Secretary of**  
19 **State?**

20 A. No.

21 **Q. Have the bylaws been drafted?**

22 A. There was a draft.

23 **Q. How about the shareholders agreement?**

24 A. There was a draft.

25 **Q. You've reviewed the draft?**

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1 **Mr. Berryhill have not finalized it, has there been some**  
2 **particular problem other than your busy schedules? Has**  
3 **there been some issue?**

4 A. Tax planning.

5 **Q. What is the issue with tax planning?**

6 A. We want the proper advice as to structure.

7 **Q. Have you sought that advice?**

8 A. Yes, we have.

9 **Q. Has it not been forthcoming or --**

10 A. It's been a recent activity with Amy Dempsey  
11 and Vickie Meier. Vickie Meier is our tax attorney.  
12 Amy Dempsey is our CPA.

13 **Q. So your testimony is that it's a tax issue**  
14 **that's holding up the finalization of the documents?**

15 A. Correct.

16 **Q. Can you tell me what the tax issue is, if you**  
17 **know.**

18 A. There are no issues. We just want proper  
19 advice before we move forward. So they are evaluating  
20 all elements of our business, Berryhill and Company.

21 **Q. As it stands today do you intend to loan the**  
22 **Berryhill operations any more money?**

23 A. Our handshake agreement is \$400,000 for fifty  
24 percent of the business.

25 **Q. Does that mean that four hundred is the**

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REPORTER'S CERTIFICATE

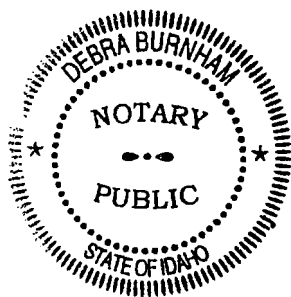
STATE OF IDAHO       )  
                              ) ss.  
COUNTY OF ADA       )

I, Debra Burnham, Certified Shorthand Reporter and  
Notary Public in and for the State of Idaho, do hereby  
certify:

That prior to being examined, the witness named in  
the foregoing deposition was by me duly sworn to testify  
to the truth, the whole truth and nothing but the truth;  
that said deposition was taken down by me in shorthand  
at the time and place therein named and thereafter  
reduced to typewriting under my direction, and that the  
foregoing transcript contains a full, true and verbatim  
record of said deposition.

I further certify that I have no interest in the  
event of the action.

WITNESS my hand and seal this 6th day of February,  
2008.



*Debra Burnham*  
Debra Burnham  
CSR, RPR and Notary  
Public in and for  
the State of Idaho.

My Commission Expires: 6-30-12

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,**  
**Liability Company,**

**Plaintiff ,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho**  
**corporation, JOHN E. BERRYHILL III and**  
**AMY BERRYHILL, individually, and as**  
**husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**NOTICE OF HEARING ON**  
**DEFENDANTS' MOTION**  
**FOR SUMMARY JUDGMENT**

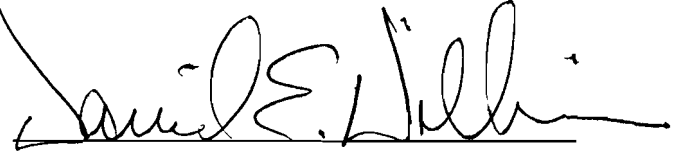
YOU ARE HEREBY NOTIFIED that Defendants Berryhill & Company, Inc., and John E. Berryhill III, will bring on for hearing before this Court on the 21<sup>st</sup> day of April, 2010, at the hour of 2:45 p.m., their Motion for Summary Judgment.

NOTICE OF HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, P. 1

000438

DATED this 22<sup>nd</sup> day of March, 2010.

THOMAS, WILLIAMS & PARK, LLP



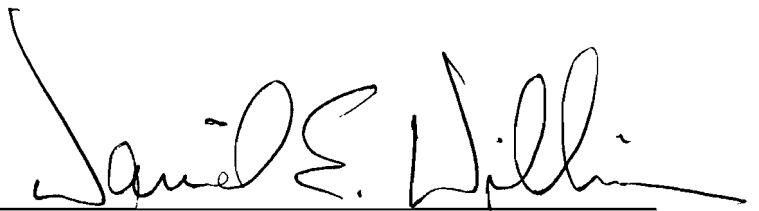
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of March, 2010, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

       Via Hand Delivery  
✓ Via Facsimile: 939-7136  
✓ Via U.S. Mail



Daniel E. Williams

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 4:15  
MAR 26 2010  
J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
danw@twplegal.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
Liability Company,

Plaintiff ,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

DEFENDANTS' MOTION  
TO COMPEL

Defendants Berryhill & Company, Inc., and John E. Berryhill III, by and through their  
counsel of record, pursuant to Rule 37(a), I.R.C.P., hereby move the Court for its Order  
compelling Plaintiff to respond without objections to Defendants' Requests for Production of

DEFENDANTS' MOTION TO COMPEL, P. 1

000440

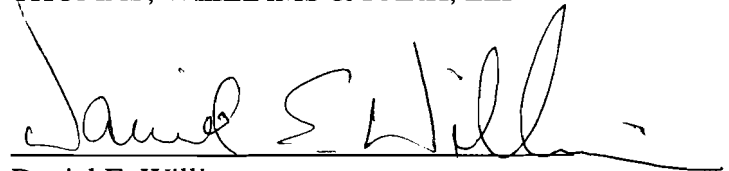
KB

Documents and for an award of reasonable expenses, including attorney's fees pursuant to Rule 37(a)(4).

In support of this motion, Defendants rely on the Affidavit of Daniel E. Williams Re: Defendants' Motion to Compel, as well as Defendants' Memorandum in Support of Motion to Compel, both filed concurrently.

DATED this 28<sup>th</sup> day of March, 2010.

THOMAS, WILLIAMS & PARK, LLP



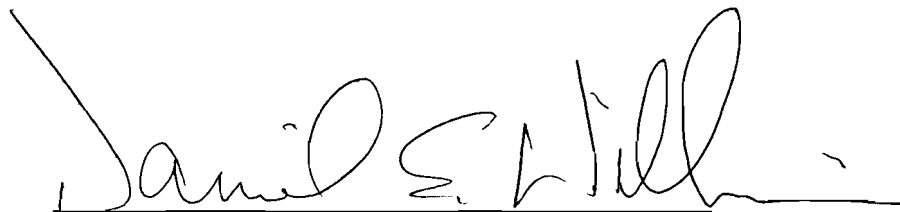
Daniel E. Williams  
Attorney for Defendants

#### CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of March, 2010, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail



Daniel E. Williams

**ORIGINAL**

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 4:15

MAR 26 2010

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
Liability Company,

Plaintiff ,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

AFFIDAVIT OF  
DANIEL E. WILLIAMS  
RE: DEFENDANTS'  
MOTION TO COMPEL

STATE OF IDAHO )  
 )ss.  
County of Ada )

DANIEL E. WILLIAMS, being first duly sworn, deposes and says:

AFFIDAVIT OF DANIEL E. WILLIAMS RE: DEFENDANTS' MOTION TO COMPEL, P. 1

000442

1. I am the attorney of record for Defendants Berryhill & Company, Inc., and John E. Berryhill III and have personal knowledge of the facts and matters set forth herein.

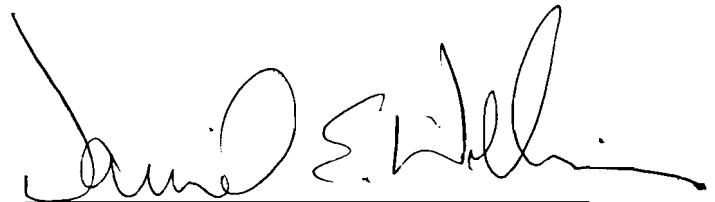
2. On January 15, 2010, Defendants served Defendants' Requests for Production of Documents on Plaintiff, a true and correct copy of which is attached as Exhibit A.

3. On February 17, 2010, Plaintiff served Plaintiff's Objections and Responses to Defendants' Requests for Production of Documents, a true and correct copy of which is attached hereto as Exhibit B.

4. The only documents produced by Plaintiff were apparently in response to Request for Production No.1. No documents were provided to any of the other seventeen (17) requests for production.

5. On March 12, 2010, I wrote to Plaintiff's counsel in an attempt to confer regarding the subject of this motion to compel and avoid the necessity of incurring the time and expense associated with bringing this motion. A true and correct copy of my letter is attached as Exhibit C.

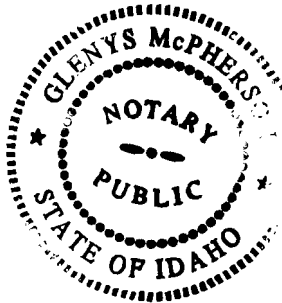
6. On March 19, 2010, Plaintiff's counsel responded in correspondence saying in relevant part: "Thank you for your letter of March 12, 2010. We will continue to assert the information and documents requested are not relevant, and will file for the appropriate protective order if necessary."

A handwritten signature in black ink, appearing to read "Daniel E. Williams", written over a horizontal line.

Daniel E. Williams



Subscribed and sworn to before me this 26<sup>th</sup> day of March, 2010.



Glenys McPherson  
Notary Public for Idaho  
Residing at Boise, Idaho  
My Commission Expires: 11-7-12

#### CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of March, 2010, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail

Daniel E. Williams  
Daniel E. Williams

# EXHIBIT A

DANIEL E. WILLIAMS (ISB 3920)  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited,  
Liability Company,

Plaintiff ,

vs.

BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.


Case No. CV OC 0909974

DEFENDANT'S FIRST  
REQUESTS FOR PRODUCTION  
TO PLAINTIFF

TO: PLAINTIFF MOSELL EQUITIES AND ITS ATTORNEYS OF RECORD

DEFENDANT'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS  
TO PLAINTIFF, P. 1

EXHIBIT

 000446

Pursuant to Rule 34 of the Idaho Rules of Civil Procedure, defendant Berryhill & Company, Inc., requests that plaintiff produce at the offices of Thomas, Williams & Park, LLP, 121 N.. 9th St., Suite 300, Boise, Idaho, within thirty (30) days of service of these Requests upon it, the following documents.

#### DEFINITIONS

Unless otherwise indicated, the following definitions will be applicable to these Requests:

(a) "Person" shall mean and include a natural person, partnership, firm or corporation or any other kind of business or legal entity, its agents or employees. In each instance wherein you are asked to "identify" a person or the "identity" of a person, state with respect to each such person his name and last known residence, business address and telephone number.

(b) The words "document" and "documents" mean all written, recorded or graphic matters, however produced or reproduced, pertaining in any way to the subject matter of this action. This definition includes, but is not limited to, any and all originals, non-identical copies or drafts, whether produced manually or by mechanical, electrical, electronic, other artificial process or a combination of these methods, of any and all of the following: correspondence, memoranda, notes, diaries, desk calendars and organizers, statistics, letters, telegrams, minutes, contracts, agreements, reports, studies, checks, statements, receipts, return summaries, pamphlets, books, prospectuses, interoffice and intraoffice communications, e-mail messages, offers, notation of any sort of conversations, telephone calls, meeting or other communications,

DEFENDANT'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS  
TO PLAINTIFF, P. 2

telephone logs, bulletins, printed matter, computer printouts, teletypes, telefax, invoices, work sheets and all drafts, alterations, modifications, changes and amendments of any of the foregoing, any graphic or aural records or representations of any kind [including, without limitations, tapes, cassettes, disks, hard drives or records of hard drives, recordings], or other graphic, symbolic, recorded or written materials of any nature whatsoever, whether in your possession, custody or control or in the possession, custody or control of your agents, attorneys, accountants, employees or any other representatives. Any document which contains any comments, notations, addition, insertion or marking of any kind which is not part of another document is to be considered as a separate document.

In each instance wherein you are asked to "identify" or describe a document, your description should include but not be limited to the following:

(1) The name, address, telephone number, occupation, job title and employer of the present custodian of the document;

(2) The date of the making of the document and the name, address, telephone number, occupation, job title and employer of each person whose testimony could be used to authenticate such document and lay the foundation for its introduction into evidence.

(c) "You" or "yours" shall refer to plaintiff Mosell Equities, its representatives, agents, or other persons acting on its behalf.

(d) "Knowledge" includes first-hand knowledge and information derived from any other source, including but not limited to hearsay knowledge.

(e) The "Polo Cove development" refers to that land development project near Sunnyslope in Canyon County, Idaho, referred to in defendant's Counterclaim.

(f) "Statement" shall refer to a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

### **REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION NO. 1:** Please produce each and every "document," as defined above, consisting of records, deeds or other documents evidencing ownership of any real property included within the Polo Cove development.

**REQUEST FOR PRODUCTION NO. 2:** Please produce each and every "document," as defined above, consisting of any agreements, contracts, letters of understanding, engagement letters or other documents evidencing any agreement relating to any services performed by any person for Glenn Mosell or Mosell Equities, LLC, or any related entity, regarding the Polo Cove development.

**REQUEST FOR PRODUCTION NO. 3:** Please produce each and every "document," as defined above, that in any way concerns, refers or relates to John Berryhill or Berryhill & Company, Inc.

**REQUEST FOR PRODUCTION NO. 4:** Please produce each and every "document," as defined above, that in any way concerns, refers to, alludes to or relates to any potential or actual investors regarding the Polo Cove development.

DEFENDANT'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS  
TO PLAINTIFF, P. 4

**REQUEST FOR PRODUCTION NO. 5:** Please produce each and every “document,” as defined above, consisting of any written communication such as a circular, offering, or any other form of invitation to invest regarding the Polo Cove development.

**REQUEST FOR PRODUCTION NO. 6:** Please produce each and every “document,” as defined above, that in any way concerns, refers to, alludes to or relates to any potential or actual vendors, hoteliers, architects, planners, marketers, or other providers of services regarding the Polo Cove development.

**REQUEST FOR PRODUCTION NO. 7:** Please produce each and every “document,” as defined above, consisting of any email communication that included John Berryhill or any current or former employee of Berryhill & Company, Inc.

**REQUEST FOR PRODUCTION NO. 8:** Please produce each and every “document,” as defined above, consisting of any email communication that in any way concerned, referred to, alluded to or related to John Berryhill or Berryhill & Company, Inc.

**REQUEST FOR PRODUCTION NO. 9:** Please produce each and every “document,” as defined above, consisting of any email communication with any potential or actual investors regarding the Polo Cove development.

**REQUEST FOR PRODUCTION NO. 10:** Please produce each and every “document,” as defined above, consisting of any email communication with any potential or actual vendors, hoteliers, architects, planners, marketers or other providers of services regarding the Polo Cove development.

**REQUEST FOR PRODUCTION NO. 11:** Please produce each and every “document,” as defined above, that in any way concerns, refers to, alludes to or relates to Plaza One Twenty One in Boise, Idaho, or its owners, landlords, agents, attorneys or other representatives.

**REQUEST FOR PRODUCTION NO. 12:** Please produce each and every “document,” as defined above, that in any way concerns, refers to, alludes to or relates to Broadway Park, Inc., or its owners, landlords, agents, attorneys or other representatives.

**REQUEST FOR PRODUCTION NO. 13:** Please produce each and every “document,” as defined above, that in any way concerns, refers to, alludes to or relates to the litigation captioned John Berryhill, an individual, and Mosell Equities, L.L.C., an Idaho limited liability company, Case No. CV OC 07-00987, in the Fourth Judicial District of the State of Idaho, in and for the County of Ada.

**REQUEST FOR PRODUCTION NO. 14:** Please produce each and every “document,” as defined above, that consists of a resume or curriculum vitae for Glenn Mosell over the last five (5) years.

**REQUEST FOR PRODUCTION NO. 15:** Please produce each and every “document,” as defined above, consisting of any written statement of any witness regarding the matters set forth in Plaintiff’s Amended Complaint.

**REQUEST FOR PRODUCTION NO. 16:** Please produce each and every “document,” as defined above, which you plan on seeking to admit into evidence at the trial of this action.

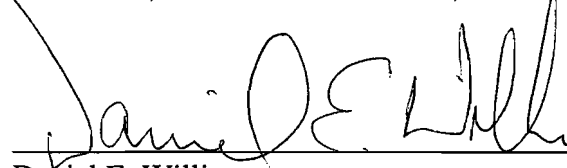


**REQUEST FOR PRODUCTION NO. 17:** Please produce each and every “document,” as defined above, which you contend evidences that the funds provided by Mosell Equities, LLC, to Berryhill & Company, Inc., constituted a “loan.”

**REQUEST FOR PRODUCTION NO. 18:** Please produce each and every “document,” as defined above, consisting of costs, invoices, billings or other statements of account relating to the Polo Cove development.

DATED this 15<sup>th</sup> day of January, 2010.

THOMAS, WILLIAMS & PARK, LLP

A handwritten signature in black ink, appearing to read "Daniel E. Williams", is written over a horizontal line.

Daniel E. Williams  
Attorney for Defendants

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
**121 N. 9<sup>th</sup> St., Suite 300**  
**P. O. Box 1776**  
**Boise, ID 83701**  
**Telephone (208) 345-7800**  
**Fax: (208) 345-7894**  
**danw@twplegal.com**

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

<b>MOSELL EQUITIES, an Idaho Limited,</b>	)	
<b>Liability Company,</b>	)	<b>Case No. CV OC 0909974</b>
	)	
<b>Plaintiff ,</b>	)	
	)	<b>NOTICE OF SERVICE</b>
<b>vs.</b>	)	<b>OF DISCOVERY</b>
	)	
<b>BERRYHILL &amp; COMPANY, INC., an Idaho</b>	)	
<b>corporation, JOHN E. BERRYHILL III and</b>	)	
<b>AMY BERRYHILL, individually, and as</b>	)	
<b>husband and wife,</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

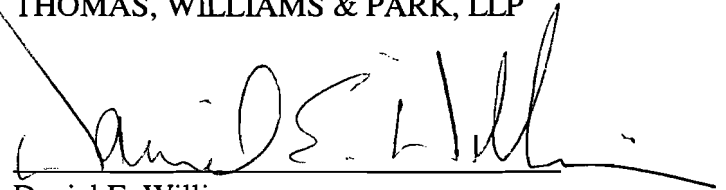
**TO: CLERK OF THE DISTRICT COURT**

YOU ARE HEREBY NOTIFIED that on the 15th day of January, 2010, I caused to be served, by U.S. Mail, postage prepaid, and by email, upon Eric R. Clark copies of Defendant's First Requests for Production of Documents to Plaintiff, along with a copy of this notice.

NOTICE OF SERVICE OF DISCOVERY, P. 1

DATED this 15 day of January, 2010.

THOMAS, WILLIAMS & PARK, LLP

A handwritten signature in black ink, appearing to read "Daniel E. Williams", written over a horizontal line.

Daniel E. Williams  
Attorney for Defendants

# EXHIBIT B

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-685-2320  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**PLAINTIFF'S OBJECTIONS AND  
RESPONSES TO DEFENDANTS'  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS**

Plaintiff Mosell Equities, LLC, hereby responds to Defendants' First Set of  
Requests for Production of Documents as follows:

Plaintiff Mosell Equities, LLC states that discovery relating to Defendants' claims is just  
beginning. Consequently, the Plaintiff specifically reserves the right to supplement its answers  
and responses to any of the following discovery requests.

## **RESPONSE TO REQUESTS FOR PRODUCTION**

REQUEST FOR PRODUCTION NO. 1: Please produce each and every “document,” as defined above, consisting of records, deeds or other documents evidencing ownership of any real property included within the Polo Cove development.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, the information requested consists of public records to which the Defendants have equal access. Without waiving this objection, please see documents attached as Exhibit 1.

REQUEST FOR PRODUCTION NO. 2: Please produce each and every “document,” as defined above, consisting of any agreements, contracts, letters of understanding, engagement letters or other documents evidencing any agreement relating to any services performed by any person for Glenn Mosell or Mosell Equities, LLC, or any related entity, regarding the Polo Cove development.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 3: Please produce each and every “document,” as defined above, that in any way concerns, refers or relates to John Berryhill or Berryhill & Company, Inc.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, the requesting Defendants already have this information as indicated by their discovery responses to Mosell Equities’ discovery requests.

REQUEST FOR PRODUCTION NO. 4: Please produce each and every “document,” as defined above, that in any way concerns, refers to, alludes to or relates to any potential or actual investors regarding the Polo Cove development.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 5: Please produce each and every “document,”

as defined above, consisting of any written communication such as a circular, offering, or any other form of invitation to invest regarding the Polo Cove development.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, the requesting Defendants already have this information as indicated by their discovery responses to Mosell Equities' discovery requests.

REQUEST FOR PRODUCTION NO. 6: Please produce each and every "document," as defined above, that in any way concerns, refers to, alludes to or relates to any potential or actual vendors, hoteliers, architects, planners, marketers, or other providers of services regarding the Polo Cove development.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 7: Please produce each and every "document," as defined above, consisting of any email communication that included John Berryhill or any current or former employee of Berryhill & Company, Inc.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 8: Please produce each and every "document," as defined above, consisting of any email communication that in any way concerned, referred to, alluded to or related to John Berryhill or Berryhill & Company, Inc.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, the request seeks information protected by the attorney – client privilege.

REQUEST FOR PRODUCTION NO. 9: Please produce each and every "document," as defined above, consisting of any email communication with any potential or actual investors regarding the Polo Cove development.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 10: Please produce each and every "document," as defined above, consisting of any email communication with any potential or actual vendors, hoteliers, architects, planners, marketers or other providers of services regarding the Polo Cove development.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 11: Please produce each and every "document," as defined above, that in any way concerns, refers to, alludes to or relates to Plaza One Twenty One in Boise, Idaho, or its owners, landlords, agents, attorneys or other representatives.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Mosell Equities also states that potentially responsive documents are not in its possession or under Mosell Equities' custody or control.

REQUEST FOR PRODUCTION NO. 12: Please produce each and every "document," as defined above, that in any way concerns, refers to, alludes to or relates to Broadway Park, Inc., or its owners, landlords, agents, attorneys or other representatives.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Mosell Equities also states that potentially responsive documents are not in its possession or under Mosell Equities' custody or control.

REQUEST FOR PRODUCTION NO. 13: Please produce each and every "document," as defined above, that in any way concerns, refers to, alludes to or relates to the litigation captioned John Berryhill, an individual, and Mosell Equities, L.L.C., an Idaho limited liability company, Case No. CV OC 07-00987, in the Fourth Judicial District of the State of Idaho, in and for the County of Ada.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Mosell Equities also states that potentially responsive documents are not in its possession or under Mosell Equities' custody or control. Further, as



Berryhill was a party to that case, he should have all of the requested documents in his possession.

REQUEST FOR PRODUCTION NO. 14: Please produce each and every "document," as defined above, that consists of a resume or curriculum vitae for Glenn Mosell over the last five (5) years.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 15: Please produce each and every "document," as defined above, consisting of any written statement of any witness regarding the matters set forth in Plaintiff's Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, and assuming that John Berryhill is a witness, see Document Nos. B&Co000358-359, 365-366, and 462. Also see Amended Complaint, Exhibits A & D.

REQUEST FOR PRODUCTION NO. 16: Please produce each and every "document," as defined above, which you plan on seeking to admit into evidence at the trial of this action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 16: As discovery has just begun, the Plaintiff has not determined what documents it may seek to admit into evidence at trial. However, it is likely the Plaintiff will seek to admit all document attached as exhibits to its pleadings, including Berryhill's written contract confirming the parties' agreement, all documents created by attorneys Kim Gourley and Victoria Meier related to Mosell Equities' buy in of the Berryhill restaurant, all Berryhill & Company, Inc. financial records confirming Berryhill accounted for the money received from Mosell Equities' as loans, Joy Luedtke's deposition transcript, Amy Dempsey's deposition transcript, Victoria Meier's deposition transcript, Berryhill's flyer titled "We're Moving Back Downtown," Attorney Dan William's letter to Paul Mangiantini dated April 2, 2009, Lease Guarantee executed by Glenn Mosell in anticipation of his ownership interest in Berryhill & Company, Inc., and any documents produced by the Defendants through discover or obtained by subpoena during this litigation.

REQUEST FOR PRODUCTION NO. 17: Please produce each and every "document," as defined above, which you contend evidences that the funds provided by Mosell Equities, LLC, to Berryhill & Company, Inc., constituted a "loan."

RESPONSE TO REQUEST FOR PRODUCTION NO. 17: Please see RESPONSE TO REQUEST FOR PRODUCTION NO. 16.

REQUEST FOR PRODUCTION NO. 18: Please produce each and every "document," as defined above, consisting of costs, invoices, billings or other statements of account relating to the Polo Cove development.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18: OBJECTION. Mosell Equities objects to this request as it is not relevant to the subject matter involved in the pending action, is vague, is overly broad, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence.

DATED this 16th day of February, 2010.

CLARK & ASSOCIATES, ATTORNEYS

A handwritten signature in black ink, appearing to read 'Eric R. Clark', written over a horizontal line.

Eric R. Clark  
For the Plaintiff

# EXHIBIT C



THOMAS, WILLIAMS  
& PARK

March 12, 2010

Eric R. Clark  
Clark & Associates  
P. O. Box 2504  
Eagle, ID 83616

VIA TELEFAX: 939-7136

RE: Mosell Equities v. Berryhill & Company, Inc.

Dear Eric:

I am writing to you pursuant to Rule 37(a)(2), I.R.C.P., regarding Plaintiff's Objections and Responses to Defendants' Requests for Production of Documents.

I note that Plaintiff objected to sixteen (16) of the eighteen (18) requests for production on the grounds of relevancy. As you are aware, Plaintiff has included a claim based on an alleged implied-in-fact contract, as well as contract by estoppel, which makes the entire course of conduct between Plaintiff and Defendants the proper subject of discovery. Moreover, as you are also aware, Defendants claim that the monies at issue were part of the greater effort to pursue the Polo Cove development and Plaintiff's involvement with Polo Cove is certainly a proper subject of discovery. Thus, Defendants' requests for production regarding these matters are certainly relevant and calculated to lead to the discovery of admissible evidence.

I note that Plaintiff provided certain documents, despite objecting on the basis of relevancy. Please withdraw Plaintiff's relevancy and other objections regarding the requests for which Plaintiff provided documents. Please also withdraw Plaintiff's relevancy and other objections to which Plaintiff refused to respond completely.

If Plaintiff does not do so by March 19, 2010, Defendants will file a motion to compel with the Court and will seek an award of expenses, including attorney's fees, pursuant to Rule 37(a)(4).

Sincerely,

Daniel E. Williams

DEW:g

**ORIGINAL**

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:15

MAR 26 2010

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

**DANIEL E. WILLIAMS (ISB 3920)**  
**THOMAS, WILLIAMS & PARK, LLP**  
121 N. 9<sup>th</sup> St., Suite 300  
P. O. Box 1776  
Boise, ID 83701  
Telephone (208) 345-7800  
Fax: (208) 345-7894  
[danw@twplegal.com](mailto:danw@twplegal.com)

**Attorneys for Defendants**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MOSELL EQUITIES, an Idaho Limited,  
Liability Company,**

**Plaintiff ,**

**vs.**

**BERRYHILL & COMPANY, INC., an Idaho  
corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,**

**Defendants.**

**Case No. CV OC 0909974**

**MEMORANDUM IN SUPPORT  
OF DEFENDANTS' MOTION  
TO COMPEL**

Defendants Berryhill & Company, Inc., and John E. Berryhill III, by and through their  
counsel of record, hereby provide their Memorandum in Support of Motion to Compel.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL, P. 1

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kh

## INTRODUCTION

Plaintiff has failed to adhere to the requirements of the rules of discovery. Part of Defendants' defense is that the funds provided by Plaintiff to Berryhill & Company, Inc., were part of a larger effort between the parties regarding the "Polo Cove" development and were never intended as a simple loan. Plaintiff's own Amended Complaint includes a count for an implied-in-fact contract, one for equitable estoppel/unjust enrichment and one for fraud. All of these counts make relevant the entire course of conduct between Plaintiff, its sole owner and managing member, Glenn Mosell, and Defendants. Despite this obvious point, Plaintiff has objected to all but two of Defendants' requests for production on the grounds of relevancy and provided documents in response to only one request.

## ARGUMENT

### **I. The rules are to be broadly and liberally construed in favor of discovery.**

I.R.C.P. 26(b)(1) permits broad discovery of any matter that is not privileged, even if it is inadmissible, so long as it is 'reasonably calculated to lead to the discovery of admissible evidence.'

*Kirk v. Ford Motor Co.*, 141 Idaho 697, 704 (2005). Rule 34(a), regarding the scope of requests for production, incorporates Rule 26(b)(1)'s broad provision for discovery. A party no longer needs to show "good cause" to obtain discovery, only relevance. "Relevance, for discovery purposes, is broadly and liberally construed." 4 Moore's Federal Practice Paragraph 26.56[1], citing *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947).

Numerous courts have held that the purpose of such broad discovery is to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and effects

disclosed to the fullest practicable extent. . . . Only strong public policies weigh against disclosure.” *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683, 78 S.Ct. 983, 986-87 (1958) (citation omitted). *See also*, *Burkhart v. Philsco Products Co., Inc.*, 738 P.2d 433, 440 (Kan. 1987); *Taylor v. Cessna Aircraft Co., Inc.*, 696 P.2D 28, 32 (Wash. App. 1985); *Redman v. Board of Regents of New Mexico*, 693 P.2d 1266, 1270 (N.M. App. 1984), *cert. denied*, 693 P.2d 591; *Davies v. Superior Court*, 682 P.2d 349, 354 (Cal. 1984); *Bond v. District Court in and for Denver County*, 682 P.2d 33, 40 (Colo. 1984).

## **II. Plaintiff’s objections to Defendants’ requests for production are unfounded.**

Request No. 1 seeks documents regarding ownership of the real property included within the Polo Cove development. Such documents are directly relevant to Defendant’s counterclaim, which deals in part with Plaintiff’s representations of ownership.

Request No. 2 seeks documents relating to any agreements with architects, vendors and others regarding Polo Cove. Such documents are directly relevant to the status of those people with whom John Berryhill dedicated substantial time on behalf of Polo Cove.

Request No. 3 seeks documents in Plaintiff’s possession, custody or control relating to Defendants, which is obviously calculated to lead to the discovery of admissible evidence.

Request No. 4 seeks documents relating to investors in Polo Cove. Again, such documents refer to individuals, with some of whom John Berryhill had substantial contacts on behalf of Polo Cove.

Request No. 5 seeks written communications in the form of an invitation to invest regarding Polo Cove. Such documents will include representations made by Plaintiff regarding Polo Cove and Defendants’ involvement in the development.

Request No. 6 seeks documents relating to hoteliers, planners and other providers of service relating to Polo Cove, with whom John Berryhill had substantial contact.

Request No. 7 seeks emails in Plaintiff's possession, custody or control that included John Berryhill or any employee of Berryhill & Company, Inc. Such emails are obviously relevant to the course of conduct between the parties.

Request No. 8 seeks similar emails that related to John Berryhill or Berryhill & Company, Inc., and are relevant for the same reason.

Request No. 9 seeks emails with investors in Polo Cove, which, like Request No. 5, may well include representations regarding the project and even mention Defendants' involvement.

Request No. 10 specifically seeks emails similar to the request in Request No. 6.

Request No. 11 seeks documents relating to the personal guarantee executed by Plaintiff's sole owner and managing member on the lease for the Berryhill & Company, Inc., restaurant, as well as the Polo Cove showroom.

Request No. 12 seeks documents in Plaintiff's possession, custody or control relating to the former site of the Berryhill & Company, Inc., restaurant. These documents are relevant, *inter alia*, to Defendants' contention that Plaintiff's owner was involved with Defendants in a relationship much different than a lender-borrower relationship.

Request No. 13 seeks documents in Plaintiff's possession, custody or control relating to the former site of the Berryhill & Company, Inc., restaurant and the lawsuit urged by Plaintiff's owner and managing member regarding that site.

Request No. 14 seeks any resume or c.v. for Glenn Mosell over the last five (5) years, which is directly relevant to his right to rely on any alleged misrepresentation made by John



Berryhill.

Request No. 15 seeks written statements of any witness regarding the matters set forth in Plaintiff's Amended Complaint. As throughout its response, the objection on the basis of relevancy is unfounded.

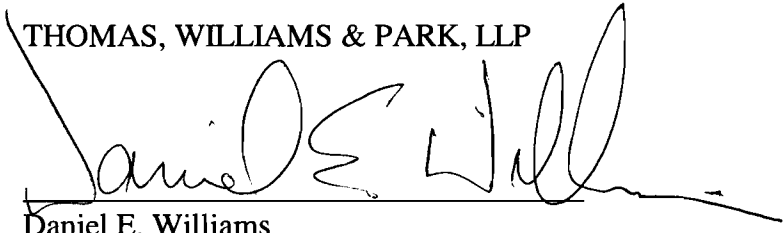
Request No. 18 seeks documents consisting of billings or invoices relating to the Polo Cove development. Such documents are directly relevant to the level of involvement claimed by Defendants in the Polo Cove development, for such documents could well document time spent with Mr. Berryhill on behalf of Polo Cove.

**CONCLUSION**

For all the foregoing reasons, Defendants respectfully request that the Court order Plaintiff to respond to Defendants' Requests for Production of Documents and enter an award in favor of Defendants for reasonable expenses, including attorney's fees pursuant to Rule 37(a)(4), I.R.C.P.

DATED this 28<sup>th</sup> day of March, 2010.

THOMAS, WILLIAMS & PARK, LLP

  
Daniel E. Williams  
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of March, 2010, a true and correct copy of the foregoing instrument was served on opposing counsel as indicated below:

Eric R. Clark  
Clark & Associates, Attorneys  
P. O. Box 2504  
Eagle, ID 83616

☐ Via Hand Delivery  
☒ Via Facsimile: 939-7136  
☒ Via U.S. Mail

  
Daniel E. Williams

TIME RECEIVED

April 7, 2010 12:00:13 PM MDT

REMOTE CSID  
208-939-7136

DURATION  
113

PAGES  
4

STATUS  
Received

4/7/2010 11:58 AM FROM: 208-939-7136 TO: 2876919 PAGE: 001 OF 004

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A.M. \_\_\_\_\_ P.M. 1:05

APR 07 2010

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**AMENDED NOTICE OF  
DEPOSITION:  
JOHN E. BERRYHILL III**

Judge Williamson

TO: JOHN E. BERRYHILL III, and his Counsel of Record.

PLEASE TAKE NOTICE that counsel for Plaintiff Mosell Equities, LLC, will take the  
testimony upon oral examination of John H. Berryhill, III pursuant to the Idaho Rules of Civil  
Procedure, before an officer authorized to administer oaths on **Tuesday, April 13, 2010, at 9:00**  
**a.m.** at the office of Attorney Dan Williams, THOMAS, WILLIAMS & PARK, LLP

AMENDED NOTICE OF DEPOSITION: JOHN E. BERRYHILL III - 1

000470

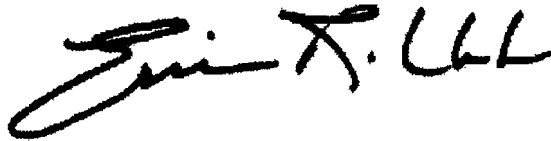
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121 N. 9<sup>th</sup> St. 300, Boise, ID 83701.

The deposition will be for all purposes authorized under the Idaho Rules of Civil Procedure.

Dated this 7<sup>th</sup> day of April 2010.

CLARK & ASSOCIATES, ATTORNEYS



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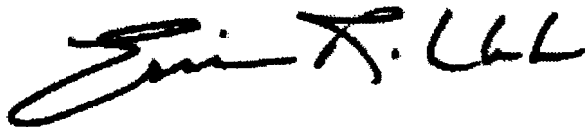
Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16th day of March, 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS &  
PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701

Burnham Habel & Associates  
Inc.  
6027 W. Clinton St  
Boise, ID 83704-9306



---

ERIC R. CLARK

NO.  
AM. FILED PM 1:05

APR 07 2010

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**NOTICE OF DEPOSITION:  
AMY D. DEMPSEY**

Judge Williamson

TO: AMY D. DEMPSEY:

PLEASE TAKE NOTICE that counsel for Plaintiff Mosell Equities, LLC, will take the  
testimony upon oral examination of Amy D. Dempsey pursuant to the Idaho Rules of Civil  
Procedure, before an officer authorized to administer oaths on **Tuesday, April 20, 2010, at  
10:00 a.m.** at the office of Attorney Dan Williams, THOMAS, WILLIAMS & PARK, LLP

NOTICE OF DEPOSITION: AMY D. DEMPSEY - 1

000472

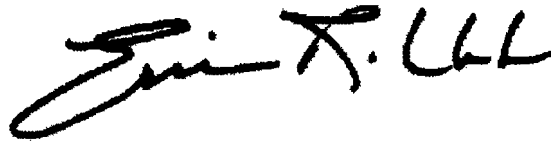
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121 N. 9<sup>th</sup> St. 300, Boise, ID 83701.

The deposition will be for all purposes authorized under the Idaho Rules of Civil Procedure.

Dated this 7th day of April 2010.

CLARK & ASSOCIATES, ATTORNEYS



---

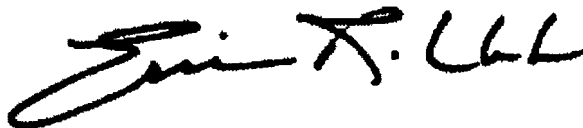
Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 7th day of April 2010, I served the foregoing, by having a true and complete copy delivered via facsimile transmission to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701

Burnham Habel & Associates Inc.  
6027 W. Clinton St  
Boise, ID 83704-9306



---

ERIC R. CLARK

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 3:13

APR 07 2010

J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**PLAINTIFF'S MOTION TO AMEND  
COMPLAINT TO INCLUDE A CLAIM  
FOR PUNITIVE DAMAGES**

Judge Williamson

\* \* \* \* \*

COMES NOW the Plaintiff Mosell Equities, LLC and according to I.C. § 6-1604, hereby  
moves for an Order allowing the Plaintiff to amend its complaint to add a claim for punitive  
damages in the prayer for relief.

The Plaintiff has filed a memorandum in support and has asked the Court to consider the  
entire record, including the Affidavits of Glenn Mosell, with exhibits, filed in support of

82B

Plaintiff's Motion For Partial Summary Judgment and in opposition to Defendants' Motion for Summary Judgment.

The Plaintiff hereby requests oral argument.

DATED this 7th day of April, 2010.

CLARK & ASSOCIATES, ATTORNEYS

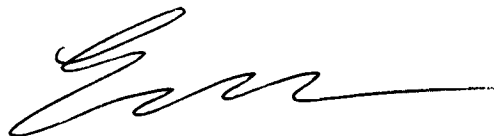


Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 7th day of April, 2010, I served the foregoing, by having a true and complete copy delivered via hand delivery to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



ERIC R. CLARK



NO. \_\_\_\_\_ FILED 313  
A.M. \_\_\_\_\_ P.M.

APR 07 2010

J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**PLAINTIFF'S MEMORANDUM  
FILED IN SUPPORT OF ITS MOTION  
TO AMEND COMPLAINT TO ADD A  
CLAIM FOR PUNITIVE DAMAGES**

Judge Williamson

\*\*\*\*\*

COMES NOW the Plaintiff and hereby provides its Memorandum in Support of its  
Motion to Amend to Include a Claim for Punitive Damages.

**INTRODUCTION**

Mosell Equities had filed a motion for partial summary judgment, and included the  
affidavit of Glenn Mosell, with several exhibits, in support of that motion. Additionally, in  
response to the Defendants' motion for summary judgment, Mosell Equities has filed an  
additional affidavit from Glenn Mosell, which includes deposition transcripts from depositions of  
PLAINTIFF'S MEMORANDUM FILED IN SUPPORT OF ITS MOTION TO AMEND COMPLAINT  
TO ADD A CLAIM FOR PUNITIVE DAMAGES - 1

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John Berryhill and Glenn Mosell taken in *John Berryhill, and Mosell Equities, L.L.C., v. Broadway Park, Inc., and Michael G. Matzek*, Ada County Case No. CV OC 07-00987.

Mosell Equities now brings this Motion and seeks permission from the Court to amend its pleadings to include a claim for punitive damages against both Berryhill & Company, Inc., and John Berryhill personally. Mosell Equities believes the facts presented establish that the Defendants' conduct was "oppressive, fraudulent, malicious or outrageous," and therefore Mosell Equities should have the opportunity to allow a jury to decide if punitive damages are warranted.

### FACTS

Mosell Equities hereby incorporates the facts and allegations as stated in its Memorandum in Support of its Motion for Partial Summary Judgment, and in its Memorandum filed in Opposition to Defendants' Motion for Summary Judgment.

The facts prove that Berryhill enticed Mosell Equities to lend over \$400,000.00 with the promise the funds would be used to purchase an interest in an entity that Berryhill owned. The facts also prove that Berryhill promised Mosell Equities that if Mosell Equities gave Berryhill the money, those funds would remain as loans to Berryhill until the parties finalized their agreement. On or about June 28, 2007 Berryhill drafted the following agreement. (Exhibit A)

*This is a loan from Mosell Equities to cover  
some misc. downtown expenses during our brokerage  
transition. It will go into the general check register &  
be used for any billing of papers needed for downtown  
or Berryhill & Co.  
It will be transitioned into part of Glenn's buy in of  
Mokery Venture Corp. Inc.*

*[Signature]* *[Signature]*

Thereafter, Mosell Equities provided \$405,000.00 to Berryhill as consideration for the "buy in" Berryhill promised in Exhibit A.

Subsequently, during Berryhill's testimony in the *Broadway Park* case, Berryhill testimony under oath confirmed the terms is Exhibit A *verbatim*.

Page 75

2 Q. Moving slightly from whatever your  
3 relationship was with Mosell Equities relative to  
4 Broadway Park, tell me what your agreement was in August  
5 of 2006 with Mosell Equities or Glenn Mosell regarding  
6 your restaurant. You testified a moment ago that he  
7 was, quote, buying into the restaurant; is that correct?

8 A. Yes.

9 Q. Explain that transaction to me.

10 [Berryhill] A. He was -- He had been paying -- There was  
11 consulting that I was doing for Polo Cove separately, of  
12 course; but we were again working out a relationship for  
13 him to be involved in Berryhill and Company. He had no  
14 goal whatsoever of being a part owner in a restaurant.  
15 However, I did not want to go into the development that  
16 started our relationship, Polo Cove, on my own. And so  
17 this was -- Over the course of time and developing our  
18 business relationship, he felt like it was a good, solid  
19 thing. I felt like it was a good, solid thing; and so  
20 we started working on it. So he started paying off part  
21 of the buy-in for Berryhill.

22 Q. What does that mean, "he started paying off  
23 part of the buy-in of Berryhill"? Put that in  
24 dollar-and-cents terms.

25 A. Started giving me money.

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1 Q. So was that Mr. Mosell personally or Mosell  
2 Equities or --

3 A. Mosell Equities.

4 Q. So Mosell Equities started giving you money?

5 A. I believe Mosell.

6 Q. So Mosell Equities started giving you money or  
7 Berryhill and Company money?

8 A. Berryhill and Company.

9 Q. How much money did he give you?

10 A. Four hundred thousand -- Little under five;

11 **half million.**

12 Q. When did he give you the 500?

13 A. It was a process.

14 Q. I'm sorry?

15 A. It was a process. I'm not sure when it  
16 started, but it would be -- It was kind of on a --  
17 wasn't all at once.

18 Q. A rolling basis?

19 A. Yeah.

20 Q. During 2006?

21 A. Expensive lunches.

22 Q. And this was during 2006?

23 A. I guess, yeah.

24 Q. Roughly the same time you were negotiating for  
25 the purchase of the Broadway Park Shopping Center?

77

1 A. I don't know if it was roughly the same time,  
2 but I would say in that 2006.

3 Q. In that time frame?

4 A. Yeah, and some was -- There's been -- We've  
5 added to it a little bit, so that's changed a little bit  
6 in 2007.

7 Q. So some payments continued into 2007?

8 A. Right.

9 Q. So what are the approximate total amounts of  
10 those payments?

11 A. Little under half million dollars.

12 Q. For ease of discussion I'm going to call it  
13 500,000; but I'm noting that you said it's slightly  
14 under.

15 A. Okay.

16 Q. What did Mosell Equities get in exchange for  
17 this half a million dollars?

18 **[Berryhill] A. Fifty percent of Berryhill and Company.**

19 Q. So today Mosell Equities owns fifty percent of  
20 Berryhill and Company?

21 A. **There's actually -- No. That paperwork is**  
22 **being drawn up.**

23 Q. But that's your understanding?

24 **[Berryhill] A. Yes.**

25 Q. So you're having somebody do the paperwork?

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1 A. **Yes.**

2 Q. So he's -- or Mosell Equities is going to be a

3 fifty percent shareholder?

4 [Berryhill] A. Yes.

5 Q. And --

6 A. I don't know if Mosell Equities, Glenn Mosell;  
7 I'm not sure.

8 Q. Because Berryhill and Company is an S corp,  
9 isn't it?

10 A. It is an S corp.

However, despite Berryhill's promises in Exhibit A as confirmed and corroborated by his sworn testimony, and although having received over \$400,000.00 from Mosell Equities, when Berryhill refused to conclude the promised "buy in," Mosell Equities requested Berryhill repay the loan. Rather than acknowledge the loan or the buy in were ever considered, however, Berryhill now contends:

First and foremost, the funds described in your letter and claimed by Mr. Mosell or Mosell Equities, LLC, did not constitute a loan to John Berryhill or Berryhill & Co., Inc. ("Berryhills" or "Berryhill & Co."). I believe you will find no note, no security terms, no repayment terms, no interest rate, nor any of the other specific terms necessary in order to sustain the concrete requisites of a *bona fide* loan. Rather, despite the parties' inability to come to terms on any particular written contractual relationship, you will find that the extensive course of dealing indicates that the relevant funds constituted an investment by Mosell Equities, LLC, in a speculative venture dealing with the proposed development of Polo Cove near Sunnyslope in Canyon County, Idaho.

### ARGUMENT

According to I.C. § 6-1604, "The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages."

The criteria or basis for an award of punitive damages are stated in IDJI 9.20 (Amended, July 2003)

If plaintiff proves by clear and convincing evidence that the defendant's acts which proximately caused injury to the plaintiff were an extreme deviation from reasonable standards of conduct and that these acts were [malicious] [fraudulent] [oppressive] or [outrageous] you may, in addition to any compensatory damages to which you find the plaintiff entitled, award to plaintiff an amount which will punish the defendant and deter the defendant and others from engaging in similar conduct in the future.

1. **Fraud.** Mosell Equities has pled a claim for fraud against Berryhill and his company. As indicated in IDJI 9.20, fraud is a basis for an award of punitive damages.

The parties had agreed that Mosell Equities would loan Berryhill money which was to be "transitioned" into ownership in Berryhill's company, and these facts are confirmed unequivocally by a document Berryhill personally drafted and his sworn testimony. Additionally, there is no dispute that Berryhill received the money – \$405,000, and that Berryhill either used the money personally or for his restaurant operations. When pressed either to consummate the promised "buy in," or repay the loan, Berryhill responded that everyone apparently had been mistaken – there was *never* a loan nor any intent to "buy in."

Mosell Equities contends, and it believes a reasonable juror will conclude, based on these undisputed facts, that Berryhill's conduct was an "extreme deviation from reasonable standards of conduct" and fraudulent, thereby entitling Mosell Equities to recover punitive damages.

2. **Breach of Contract.** Mosell Equities also seeks to amend to include a claim for punitive damages in its breach of contract claim. The Idaho Supreme Court has ruled that punitive damages are available in a contract case, if the facts indicate a party acted in a manner warranting punitive damages.

In *Myers v. Workmen's Auto Insurance*, the District Court allowed Myers to amend her complaint to include a claim for punitive damages and the Idaho Supreme Court upheld a

substantial punitive damages jury verdict. On appeal, Workmen's Auto argued that punitive damages are not allowed in breach of contracts cases. The Supreme Court disagreed and ruled it is not the basis of the cause of action, but the nature of the conduct warranting punitive damages.

Workmen's Auto also claims that punitive damages are not available in the routine, ordinary breach of contract action. While this is a correct statement of the law, *Linscott v. Rainier Nat'l Life Ins. Co.*, 100 Idaho 854, 861, 606 P.2d 958, 965 (1980), *it should not be construed as a blanket prohibition against punitive damages in breach of contract claims.* It is not the nature of the case, whether tort or contract, that controls the issue of punitive damages. The issue revolves around whether the plaintiff is able to establish the requisite "intersection of two factors: a bad act and a bad state of mind." *Id.* at 858, 606 P.2d at 962. As this Court noted in *Linscott*, *"numerous situations arise where the breaking of a promise may be an extreme deviation from standards of reasonable conduct, and, when done with knowledge of its likely effects, may be grounds for an award of punitive damages."* *Id.* at 860, 606 P.2d at 964. (Emphasis added)

*Myers v. Workmen's Auto Insurance*, 140 Idaho 495, 502-03, 95 P.3d 977, 984-85 (2004).

Mosell Equities contends, notwithstanding Berryhill's fraud, his conduct was also malicious, oppressive and outrageous. As noted above, Berryhill, although having received over \$400,000.00, denied there was ever a deal, despite previously testifying under oath that there was a deal. Based on these facts, a reasonable juror could certainly conclude that Berryhill's conduct was "an extreme deviation from reasonable standards of conduct" and his "acts were malicious, oppressive, or outrageous."

## CONCLUSION

Mosell Equities hereby requests that the Court GRANT its motion to amend and allow it to file a complaint which includes a claim for punitive damages in the prayer for relief.

RESPECTFULLY SUBMITTED this 7th day of April, 2010.

CLARK & ASSOCIATES, ATTORNEYS

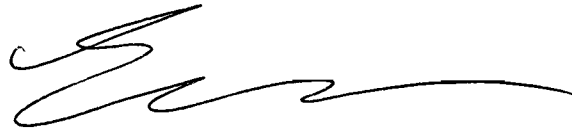


Eric R. Clark  
For the Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 7th day of April, 2010, I served the foregoing, by having a true and complete copy delivered via hand delivery to:

Daniel E. Williams  
THOMAS, WILLIAMS & PARK, LLP  
121 N. 9th St. Suite 300  
P.O. Box 1776  
Boise, ID 83701



ERIC R. CLARK



APR 07 2010

J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

ERIC R. CLARK, Esq.  
CLARK & ASSOCIATES, ATTORNEYS  
P.O. Box 2504  
Eagle, Id 83616  
Office: 208-830-8084  
Fax: 208-939-7136  
Idaho State Bar No. 4697

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

MOSELL EQUITIES, an Idaho Limited  
Liability Company,

Plaintiff,

vs.

BERRYHILL & COMPANY, INC. an Idaho  
Corporation, JOHN E. BERRYHILL III and  
AMY BERRYHILL, individually, and as  
husband and wife,

Defendants.

Case No. CV OC 0909974

**PLAINTIFF'S RESPONSE TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Judge Williamson

\* \* \* \* \*

COMES NOW the Plaintiff and hereby provides its Memorandum in Opposition to  
Defendants' Motion for Summary Judgment.

**INTRODUCTION**

While every party may be entitled to move for summary judgment, moving under the  
circumstances where every claim that no genuine issue of material fact exists is impeached and  
contradicted by that parties' own testimony under oath, one has to question whether the motion

AKB

was brought in good faith. In this case, literally every fact that Berryhill<sup>1</sup> cites in support of his motion for summary judgment is contradicted by or directly opposite of Berryhill's testimony under oath in *John Berryhill, and Mosell Equities, L.L.C., v. Broadway Park, Inc., and Michael G. Matzek*, Ada County Case No. CV OC 07-00987. Additionally, while Berryhill cites to snippets of Mr. Mosell's testimony in that case, in support of Berryhill's motion for summary judgment, Berryhill takes that testimony out of the contexts of the deposition as a whole. When the Court reads the rest of Mr. Mosell's testimony, it will be clear that Berryhill is attempting to mislead the Court just as he did Mosell when Berryhill enticed Mosell to lend Berryhill \$405,000.00.

### STATEMENT OF FACTS

Mosell contacted Berryhill in 2005 regarding Polo Cove, and inquired if Berryhill "was interested in being a part of that project, the resort development aspect, and putting in a restaurant." (Berryhill TR., p. 57, LL. 16-18.<sup>2</sup>)

Subsequently, in 2006, Berryhill asked Glenn Mosell to consider partnering with Berryhill in purchasing a shopping center in Boise, Idaho where Berryhill was operating his restaurant and was a tenant. (Berryhill TR., p. 59, LL. 5-20.)

Mosell's company, Mosell Equities, agreed to partner with Berryhill and attempt to purchase the Broadway Park Shopping Center for 5.5 million dollars. (Berryhill TR., Exhibit 6, Purchase & Sale Agreement to purchase the Broadway Park Shopping Center.)

Ultimately, a dispute arose and Berryhill and Mosell Equities sued the company that owned the shopping center and sought to recover the \$50,000.00 earnest money deposit. (*John Berryhill, and Mosell Equities, L.L.C., v. Broadway Park, Inc., and Michael G. Matzek*, Ada County Case No. CV OC 07-00987.) Mosell Equities and Berryhill wanted to terminate the Purchase & Sale agreement because the owner, after the due diligence period expired, had signed a long-term lease with a Hookah Bar, at a lease rate lower than the potential purchasers thought was reasonable.

During that litigation, counsel for the Defendants scheduled and took the depositions of John Berryhill and Glenn Mosell. The Defendants in the *Broadway Park* case defended and asserted

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<sup>1</sup> Mosell Equities refers to Defendants John Berryhill and Berryhill & Company, Inc. herein collectively as "Berryhill."

<sup>2</sup> In, *John Berryhill, and Mosell Equities, LLC., v. Broadway Park, Inc., and Michael G. Matzek*, Ada County Case No. CV OC 07-00987.

that Mosell Equities and Berryhill sought to avoid the Purchase and Sale Contract, not because of anything the Defendants had done, but because Mosell Equities and Berryhill did not have funds to actually purchase the property, a situation that would not have entitled Mosell Equities and Berryhill to a refund of Mosell Equities' \$50,000.00 earnest money deposit. (See, both Affidavits.)

During Berryhill's deposition, Defendant's counsel inquired about the business relationship between Mosell Equities and Berryhill, as both Mosell Equities and Berryhill individually were listed as purchasers on the Purchase and Sale agreement. Berryhill testified that Mosell was buying into Berryhill & Company, Inc., at that time, so there was not a solid agreement regarding the actual ownership of the shopping center.

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- 21 Q. Tell me. At this period of time had you and  
22 Mr. Mosell or you and Mosell Equities decided what your  
23 agreement was going to be between the two of you?  
24 A. As far as a partnership?  
25 Q. Whatever your arrangement was. If that was a

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- 1 partnership, yes; or if that was a corporation, what  
2 were you going to do? Because originally it was your  
3 idea to buy the shopping center. You brought Mr. Mosell  
4 in. So I assume you and Mr. Mosell must have had some  
5 sort of arrangement or agreement between the two of you.  
6 [Berryhill] A. Yeah. There was a lot of -- I mean for  
7 instance, Glenn Mosell was buying into Berryhill; and  
8 there was, you know, funds from that, that I would take  
9 them and roll into the center. But I mean we were -- we  
10 had not yet purchased the center. We had not yet -- we  
11 had discussed how we would be doing things; but again, I  
12 say we were kind of operating on the same table in favor  
13 of relationship and working right along with Mike on  
14 this. And Mike had not asked anything about who's going  
15 to be the -- "What's you all's relationship," et cetera,  
16 et cetera.

When Counsel asked Berryhill to explain about Mosell's "buy in," Berryhill responded that the money at issue in this lawsuit that Mosell Equities was providing to Berryhill & Company, Inc., would entitle Mosell Equities to 50% ownership in Berryhill & Company, Inc.

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- 2 Q. Moving slightly from whatever your  
3 relationship was with Mosell Equities relative to

4 Broadway Park, tell me what your agreement was in August  
5 of 2006 with Mosell Equities or Glenn Mosell regarding  
6 your restaurant. You testified a moment ago that he  
7 was, quote, buying into the restaurant; is that correct?

8 A. Yes.

9 Q. Explain that transaction to me.

10 [Berryhill] A. He was -- He had been paying -- There was  
11 consulting that I was doing for Polo Cove separately, of  
12 course; but we were again working out a relationship for  
13 him to be involved in Berryhill and Company. He had no  
14 goal whatsoever of being a part owner in a restaurant.  
15 However, I did not want to go into the development that  
16 started our relationship, Polo Cove, on my own. And so  
17 this was -- Over the course of time and developing our  
18 business relationship, he felt like it was a good, solid  
19 thing. I felt like it was a good, solid thing; and so  
20 we started working on it. So he started paying off part  
21 of the buy-in for Berryhill.

22 Q. What does that mean, "he started paying off  
23 part of the buy-in of Berryhill"? Put that in  
24 dollar-and-cents terms.

25 A. Started giving me money.

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1 Q. So was that Mr. Mosell personally or Mosell  
2 Equities or --

3 A. Mosell Equities.

4 Q. So Mosell Equities started giving you money?

5 A. I believe Mosell.

6 Q. So Mosell Equities started giving you money or  
7 Berryhill and Company money?

8 A. Berryhill and Company.

9 Q. How much money did he give you?

10 A. Four hundred thousand -- Little under five;  
11 half million.

12 Q. When did he give you the 500?

13 A. It was a process.

14 Q. I'm sorry?

15 A. It was a process. I'm not sure when it  
16 started, but it would be -- It was kind of on a --  
17 wasn't all at once.

18 Q. A rolling basis?

19 A. Yeah.

20 Q. During 2006?

21 A. Expensive lunches.

22 Q. And this was during 2006?  
23 A. I guess, yeah.  
24 Q. Roughly the same time you were negotiating for  
25 the purchase of the Broadway Park Shopping Center?

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1 A. I don't know if it was roughly the same time,  
2 but I would say in that 2006.  
3 Q. In that time frame?  
4 A. Yeah, and some was -- There's been -- We've  
5 added to it a little bit, so that's changed a little bit  
6 in 2007.  
7 Q. So some payments continued into 2007?  
8 A. Right.  
9 Q. So what are the approximate total amounts of  
10 those payments?  
11 A. Little under half million dollars.  
12 Q. For ease of discussion I'm going to call it  
13 500,000; but I'm noting that you said it's slightly  
14 under.  
15 A. Okay.  
16 Q. What did Mosell Equities get in exchange for  
17 this half a million dollars?  
18 **[Berryhill] A. Fifty percent of Berryhill and Company.**  
19 Q. So today Mosell Equities owns fifty percent of  
20 Berryhill and Company?  
21 **A. There's actually -- No. That paperwork is**  
22 **being drawn up.**  
23 Q. But that's your understanding?  
24 **[Berryhill] A. Yes.**  
25 Q. So you're having somebody do the paperwork?

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1 **A. Yes.**  
2 Q. So he's -- or Mosell Equities is going to be a  
3 fifty percent shareholder?  
4 **[Berryhill] A. Yes.**  
5 Q. And --  
6 A. I don't know if Mosell Equities, Glenn Mosell;  
7 I'm not sure.  
8 Q. Because Berryhill and Company is an S corp,  
9 isn't it?  
10 A. It is an S corp.

Now, Counsel inquires about the Polo Cove project and begins the questioning by noting he understood there were several *relationships* between Mosell and Berryhill. Counsel identified that he had inquired about Berryhill's relationship with Glenn Mosell and Mosell Equities "relative to the shopping center," that he had questioned Berryhill about Berryhill's relationship with Glenn Mosell and Mosell Equities "relative to the [downtown] restaurant," and now he wants Berryhill to discuss his or Berryhill & Company, Inc.'s relationship with Mosell Equities as it related to the separate Polo Cove project.

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11 Q. All right. So we talked a little bit about  
12 the relationship relative to the shopping center. We  
13 talked about the relationship relative to the  
14 restaurant. Tell me what your relationship, or  
15 Berryhill and Company's relationship is to the Polo Cove  
16 project.

17 **[Berryhill] A. It's a resort development, and that deals with**  
18 **hospitality. And we're in the hospitality business. So**  
19 **we're going to put a restaurant and catering events --**  
20 **run the hospitality.**

21 Q. Okay. Now, Polo Cove: That's a real estate  
22 development or concept in Canyon County, right?

23 A. Yes.

24 Q. But nothing's been built yet, has it?

25 A. In the process, in the beginning phase.

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1 Q. Like what's been done?

2 A. There's no sticks in the air. Couple of homes  
3 have been moved out. There's 30-year-old vines there.  
4 Taken restaurant, hotel, winery, and venue homes to  
5 concept architecturally.

6 Q. What is it you said, that you have been  
7 consulting for Polo Cove?

8 A. And it's --

9 Q. Entitled?

10 A. Yes. Commission -- What do you call that?  
11 Went to all those great meetings in Caldwell.  
12 Commissioners.

13 Q. You have testified that you've done some

14 consulting for Polo Cove, right?  
15 A. Yes.  
16 Q. What's the nature of that consulting?  
17 A. I would run the architects' group for a while.  
18 And this was initially as we were getting involved,  
19 getting involved in it, before I got further involved as  
20 a partner.  
21 Q. So you have been providing advice as to  
22 restaurant and hospitality operations?  
23 A. Right now I don't get paid.  
24 Q. Did you ever get paid for your consulting  
25 services?

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1 A. Yes.  
2 Q. How much did you get paid?  
3 A. I don't know the total amount, actually.  
4 Q. Approximately.  
5 A. Ten, fifteen, twenty-five thousand dollars,  
6 maybe.  
7 Q. When did you receive these payments?  
8 A. Based on -- Depending on when I did the work.  
9 Q. When did you do the work?  
10 A. Over the course of first couple of years, I  
11 guess.  
12 Q. So would that have been 2005?  
13 A. Yeah.  
14 Q. And 2000- --  
15 A. Mostly in 2005.  
16 Q. Did you do any consulting work in 2006?  
17 A. Well, I do consulting work all the time for --  
18 I consult -- I consulted on the -- with the State of  
19 Idaho, with the City of Boise, with Parks and Rec.  
20 Every event building that's been built in this city  
21 almost I've consulted on.  
22 Q. I'm sorry. Let me rephrase the question. Did  
23 you do any consulting for Polo Cove in 2006?  
24 A. I don't recall. Maybe I did. I'm not -- I'm  
25 not sure. Is there an easier way to ask? I'm not sure

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1 what you're asking for, because maybe I can answer it in  
2 a better way. I'm not sure.  
3 Q. No; that's fine. Thank you.

Then Berryhill, when questioned about his involvement in the Polo Cove project, concedes he does not have information responsive to such questions because for the last six months or so, prior to his deposition in January 2008, Berryhill's focus was on moving the Berryhill & Company, Inc., restaurant downtown. Berryhill testified he had "pushed back" from the Polo Cove project and had not been involved since mid-2007.

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14 [By Mr. Roe] So getting back to the question, in that  
15 second paragraph under "Project Schedule," it says,  
16 quote: "Construction of the hotel, restaurant, and  
17 education and conference center is expected to begin in  
18 the third quarter of 2008." Closed quote.

19 Do you see that?

20 A. I do see that.

21 Q. Are you still on that schedule?

22 A. We are not on that schedule.

23 Q. Do you know what the new schedule is?

24 A. Schedule has been pushed back.

25 Q. Why has it been pushed back?

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1 A. That would be a better question for my  
2 partner.

3 Q. Do you know why it's been pushed back?

4 A. It would just be a better question for my --

5 Q. Mr. Berryhill, answer the question. Do you  
6 know why it's been pushed back?

7 **[Berryhill] A. I've been in focus on opening a new**  
8 **restaurant, so I've pushed back from focusing on Polo**  
9 **Cove. For the last six months I haven't even been going**  
10 **to the Polo Cove meetings because -- And I'm -- and I'm**  
11 **an important part of Polo Cove. But I've had a**  
12 **different focus; to make a restaurant successful in a**  
13 **new location. So any answer that I'm going to give in**  
14 **relation to a recent time line, who's coming in, the**  
15 **changes, et cetera, might steer you from the closest**  
16 **truth or the truth that you would get much better from**  
17 **my partner, Glenn Mosell, who you are deposing next**  
18 **week.**

19 Q. Thank you. Why has the schedule been pushed  
20 back, if you know?

21 A. I don't know.



22 Q. Thank you.

Berryhill admits he was paid up to \$25,000.00 for “consulting” as part of the Polo Cove project, and after being paid, he had “pushed away” from that project to concentrate on moving and operating the restaurant downtown. In Berryhill’s Affidavit he filed in support of his Motion For Summary Judgment, however, he tells a different story. Berryhill now claims that he “for roughly three years, I devoted substantial amounts of time to the Polo Cove venture, ... [and] I did so upon my understanding with Glenn Mosell, that Berryhill & Company, Inc., would participate in the Polo Cove profits beyond operation of the restaurant.” (Berryhill Aff., para. 3.)

Defense Counsel then took Glenn Mosell’s deposition on February 5, 2008. Mr. Berryhill was present at Mosell’s deposition when Defendant’s Counsel questioned Mosell about the Berryhill & Company “buy in.” Mr. Mosell testified, with Berryhill in the room with Mosell, that the money was a loan that was to be converted to equity in Berryhill & Company.

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9 Q. Please describe for me the contracts and legal  
10 agreements that memorialize that blending, please, and  
11 that relationship.

12 A. Trout Jones had put together documents for  
13 Moberry Ventures, Inc., that we never finalized.

14 Q. Why were they not finalized?

15 A. Our focus was opening the restaurant downtown  
16 at the Plaza 121 during the second half of 2006, and we  
17 just haven't gotten to finalization of that Moberry  
18 entity. **In lieu of my purchasing equity, I have loaned**  
19 **Berryhill and Company \$385,000.**

20 Q. Mr. Mosell, you said in lieu of the purchase  
21 of equity you have loaned Berryhill \$385,000. Do you  
22 mean that as a permanent substitute or is that an  
23 interim?

24 A. **Interim substitute.**

25 Q. Well, going back to my last question, I asked

1 you to describe all of the legal documents that  
2 memorialize this blending of operations; and I believe  
3 your answer was "Well, we just haven't done it yet"?  
4 A. Correct.  
5 Q. Is that correct?  
6 A. Correct.  
7 Q. But you have loaned him \$385,000?  
8 **[Mosell] A. Correct.**  
9 Q. Is that pursuant to a promissory note?  
10 **A. Pursuant to a handshake and checks.**  
11 Q. Is that loan secured in any way?  
12 A. It is not.  
13 Q. And you know what I mean by "secured"?  
14 A. No formal note.  
15 Q. And what has Mr. Berryhill done with that  
16 \$385,000?  
17 **A. Gave 60,000 of it to Michael Matzek to pay off**  
18 **equipment, and much of it was spent for the new**  
19 **restaurant at Plaza 121; tenant improvements, moving**  
20 **expenses, ramping up the business. And he's doing quite**  
21 **well there. I should say I, on good faith, also**  
22 **cosigned on the lease with Mr. Berryhill with Tomlinson**  
23 **and Associates.**

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2 Q. Mr. Mosell, you have quite a bit of experience  
3 in business, right?  
4 A. Fair amount.  
5 Q. And you've made a loan to this restaurant in  
6 the amount of \$385,000, right?  
7 **[Mosell] A. Correct.**  
8 Q. And you've agreed to purchase half of it,  
9 right?  
10 **A. Correct.**  
11 Q. You still intend to do so?  
12 **[Mosell] A. Yes, converting the loan into equity.**

Defendant's counsel then pressed Mosell for more information about Mosell Equities' arrangement with Berryhill and Berryhill & Company, Inc. regarding Mosell Equities' "buy in."

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7 Q. But is it your testimony, Mr. Mosell, that the  
8 Berryhill operations have been profitable each month  
9 since September '07, running through January '08?

10 A. If you take out the nonrecurring expenses of  
11 the move and the tenant improvements; absolutely, yes.  
12 Q. How will those profits be divided between you  
13 and Mr. Berryhill? In rough numbers let's say there was  
14 a three-million-dollar year, and profit was ten percent  
15 of that, three hundred thousand.  
16 [Mosell] A. We would split that \$300,000 profit  
17 fifty-fifty.  
18 Q. That's the deal?  
19 A. That would be our understanding.  
20 Q. Well, with respect to the 385,000 that you've  
21 already loaned Berryhill, is he paying interest on that?  
22 Or what are the terms of that loan?  
23 [Mosell] A. No details, no formal note has been put  
24 together. Right now if I decided not to be a part of  
25 Berryhill and Company, we could separate and I could say

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1 "Give me back \$385,000 and we'll go our separate ways."  
2 Right now we're moving forward with that  
3 understanding. The same could be said about Polo Cove.  
4 Q. I'm sorry. What do you mean with respect to  
5 Polo Cove?  
6 A. We have no contractual arrangement on Polo  
7 Cove. We have no contractual arrangement with Berryhill  
8 and Company at this point. No contract exists.  
9 Q. With respect to your relationship or that of  
10 Mosell Equities to the Berryhill restaurant and catering  
11 operations, your testimony is that there are no  
12 documents; they just haven't been done yet. Right?  
13 A. There were articles written for Moberry  
14 Ventures. We have not signed any of those documents.  
15 Q. Moberry Ventures, Inc.: Was that going to be  
16 an S corp?  
17 A. Yes.  
18 Q. Has it been organized with the Secretary of  
19 State?  
20 A. No.  
21 Q. Have the bylaws been drafted?  
22 A. There was a draft.  
23 Q. How about the shareholders agreement?  
24 A. There was a draft.  
25 Q. You've reviewed the draft?

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1 A. Not since last summer. And again, we haven't

2 focused on that.

3 Q. If you and Mr. Berryhill had drafts of these  
4 documents since last summer, why haven't you finalized  
5 them?

6 [Mosell] A. **I've been quite busy with Polo Cove. John's**  
7 **been quite busy opening a new restaurant. There's an**  
8 **element of trust moving forward, and that's where we're**  
9 **at.**

10 Q. Mr. Mosell, is it your understanding today  
11 that if -- you have the absolute right to walk away from  
12 the restaurant, demand your 385,000 back?

13 [Mosell] A. **Yes.**

14 Q. Is that correct?

15 A. **Yes. That would not relieve me of my**  
16 **obligation on cosigning of that space, though.**

17 Q. So is it your intent today to go forward with  
18 the purchase of fifty percent of the Berryhill  
19 operations?

20 A. **That is my intent, yes.**

21 Q. But you have the absolute right to walk away  
22 from that intent if you chose to?

23 A. **Yes.**

When Berryhill testified in his deposition that Mosell Equities was buying in and the paperwork was being drawn up.” Berryhill was referring to his recent meeting with Mosell and Attorney Victoria Meier.

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16 Q. What did Mosell Equities get in exchange for  
17 this half a million dollars?

18 [Berryhill] A. **Fifty percent of Berryhill and Company.**

19 Q. So today Mosell Equities owns fifty percent of  
20 Berryhill and Company?

21 A. **There's actually -- No. That paperwork is**  
22 **being drawn up.**

23 Q. But that's your understanding?

24 [Berryhill] A. **Yes.**

25 Q. So you're having somebody do the paperwork?

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1 A. **Yes.**

On January 22, 2008, Berryhill and Mosell met with Attorney Victoria Meier, and at Berryhill's direction, Ms. Meier drafted the "buy in" documents, which she delivered to Mosell and Berryhill in February 2009. One of the documents she was directed to create was a "special meeting" of the Berryhill & Company, Inc. Board of Directors and Shareholders form, in which she included and stated the information she had received from Berryhill in that January meeting.

**BERRYHILL & COMPANY, INC.  
SPECIAL MEETING OF THE  
BOARD OF DIRECTORS AND SHAREHOLDERS**

**Effective the December 31, 2007**

The undersigned, being Secretary of BERRYHILL & COMPANY, INC., an Idaho corporation (the "Company"), by this instrument evidences the actions and resolutions undertaken at the special meeting of the Board of Directors and Shareholders of the Company. Present was the sole Shareholder and the Directors who waived notice of the meeting.

WHEREAS, the Company has borrowed Four Hundred Thousand Dollars from Glenn E. Mosell for the funding of the relocation of the Company's restaurant to a new location and for the capital improvements to be made to the restaurant and banquet rooms.

WHEREAS, Glenn E. Mosell desires to acquire an interest in the Company in exchange for, and as repayment of, the amount lent to the Company.

WHEREAS, the Directors and the Sole Shareholder believe it is in the best interest of the Company to issue Glenn E. Mosell two hundred (200) shares of the common capital stock of the Company as repayment of the amount lent to the Company.

RESOLVED, that upon receipt of the Satisfaction of Loan evidencing that the Company's obligation to Mosell has been paid, the Directors are hereby authorized to issue two hundred (200) shares of the one dollar (\$1) par value common capital stock of the Company to Mosell.

Ms. Meier also drafted a "stock purchase agreement" to confirm the "buy in."

**STOCK PURCHASE AGREEMENT**

THIS STOCK PURCHASE AGREEMENT (hereinafter "Agreement") is made and entered into effective the \_\_\_\_ day of \_\_\_\_\_, 2007, by and between BERRYHILL & COMPANY, INC., an Idaho corporation (the "Corporation"), and GLENN E. MOSELL, a married man dealing with his separate property ("Mosell").

**WITNESSETH:**

WHEREAS, John Berryhill (the "Shareholder") is the sole shareholder and record owner of two hundred (200) shares, \$1.00 par value, of the issued and outstanding common capital stock of BERRYHILL & COMPANY, INC., an Idaho corporation (hereinafter the "Corporation"). John Berryhill's shares represent one hundred percent (100%) of the issued and outstanding common capital stock of the Corporation and are evidenced by Certificates No. 1 and No. 2.

WHEREAS, during the calendar year of 2007, Mosell loaned the Corporation Four Hundred Thousand Dollars (\$400,000) to fund the relocation of the Corporation's restaurant and for capital improvements needed for the Corporation's restaurant and banquet rooms (the "Loan").

WHEREAS, the Corporation desires to issue two hundred (200) shares of the Corporation's common capital stock to Mosell as repayment of the Loan. Mosell desires to accept the two hundred (200) shares of the Corporation's common capital stock as repayment of the Loan and to have the Loan reclassified on the Corporation's books and records as a capital contribution from Mosell.

WHEREAS, after the execution of this Agreement, Mosell and the Shareholder will each own fifty percent (50%) of the common capital stock of the Corporation.

WHEREAS, the Directors of the Corporation and the Shareholder have agreed that it is in the best interest of the Corporation to authorize and to admit Mosell as a shareholder of the Corporation and to reclassify the Loan as a capital contribution from Mosell as payment for the two hundred (200) shares pursuant to the terms and conditions of this Agreement.

Finally, Ms. Meier drafted a satisfaction of loan document, confirming the money Mosell Equities provided had remained as a loan pending the "transition" from loan to equity.

**SATISFACTION OF LOAN**

KNOW ALL MEN BY THESE PRESENTS, that **GLENN E. MOSELL**, a married man dealing with his sole and separate property, does hereby certify and declare that the certain Loan in the original amount of Four Hundred Thousand Dollars (\$400,000) made and entered into by BERRYHILL & COMPANY, an Idaho corporation, as "borrower", to GLENN E. MOSELL, as "lender", is fully paid, satisfied and discharged.

DATED: \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Glenn E. Mosell

Now, despite Mr. Berryhill's testimony under oath in the *Broadway Park* case, confirming that every penny of the money Mosell Equities lent was part of Mosell Equities or Glenn Mosell's "buy in" of 50% ownership in Berryhill & Company, Inc., that Berryhill had used all of the Mosell Equities' money to benefit Berryhill & Company, Inc., and after having directed his attorney to draft documents confirming that Mosell Equities had loaned Berryhill & Company, Inc., \$405,000.00; Berryhill ultimately refused to sign the any legal documents completing the "buy in." Despite the overwhelming evidence to the contrary, Berryhill now through counsel asserts "the relevant funds constituted an investment by Mosell Equities, LLC in a speculative venture dealing with the proposed development of Polo Cove near Sunnyslope in Canyon County, Idaho," (Dan Williams Letter, dated April 2, 2009, Amended Complaint, Exhibit D.), and there never was a loan or "buy in."

### ARGUMENT

Berryhill has the burden of challenging each element of Mosell Equities' claims and must provide facts supporting his claim that no genuine issue of material fact exists when moving for summary judgment. Simply arguing, without facts, that Mosell Equities "cannot sustain a claim..." as Berryhill does repeatedly in his brief, does not shift the burden to Mosell Equities to respond with "specific facts."

*The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. In order to meet its burden, the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case. If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the nonmoving party, and the non-moving party is not required to respond with supporting evidence. Id. at 600, 944 P.2d at 1363, quoting from Smith v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 714, 718-19, 918 P.2d 583, 587-88 (1996) (emphasis added) (citations omitted).*

## FRAUD

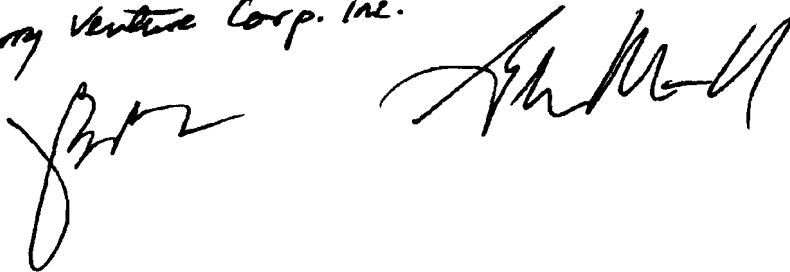
While there are nine elements to a claim for fraud, Berryhill only has challenged two of these elements in his motion – that any representation was false, and Mosell could not have reasonably relied on Berryhill's statements, even if false.

### 1. Berryhill Made Two False Representations.

First, Berryhill promised it that if Mosell Equities gave Berryhill & Company, Inc, money, then Mosell Equities would receive an ownership interest in a company that owned Berryhill & Co. restaurant. The other promise was if the parties could not reach an agreement about the "buy in," the funds Mosell Equities provided would constitute a "loan" to Berryhill & Company, Inc.

These promises are identified in Berryhill's handwritten contract, which the parties used to memorialize their agreement that the funds Mosell Equities provided would remain a "loan" pending Mosell Equities' ultimate "buy in." (Amended Complaint, Exhibit A.)

*This is a loan from Mosell Equities to cover some misc. downtown expenses during our bookkeeper transition. It will go into the general check register & be used for any billing of papers needed for downtown or Berryhill & Co. It will be transitioned into part of Glenn's "buy in" of Mohrny Venture Corp. Inc.*

Two handwritten signatures are present. The signature on the left is written in dark ink and appears to be 'John'. The signature on the right is written in dark ink and appears to be 'Glenn'.



In January 2008, Berryhill testified under oath, after *spending* \$405,000.00 (\$50,000.00 of which went into his own pocket) received from Mosell Equities, that the money entitled Mosell Equities to 50% ownership in Berryhill & Company, Inc, as he had stated 7 months earlier when he signed Exhibit A. On January 30, 2008 Berryhill confirmed that all that was left to do was draft and sign the contracts, which he ultimately refused to do.

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- 16 Q. What did Mosell Equities get in exchange for  
17 this half a million dollars?  
18 **[Berryhill] A. Fifty percent of Berryhill and Company.**  
19 Q. So today Mosell Equities owns fifty percent of  
20 Berryhill and Company?  
21 **A. There's actually -- No. That paperwork is**  
22 **being drawn up.**  
23 Q. But that's your understanding?  
24 **A. Yes.**  
25 Q. So you're having somebody do the paperwork?

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- 1 **A. Yes.**  
2 Q. So he's -- or Mosell Equities is going to be a  
3 fifty percent shareholder?  
4 **[Berryhill] A. Yes.<sup>3</sup>**

Berryhill told Mosell Equities initially that the money it loaned to Berryhill & Company, Inc. would be credited towards a “buy in” when Mosell Equities made the first loan installment in June 2007, and then Berryhill confirmed these representations under oath in January 2008. Despite confirming and acknowledging the Mosell Equities’ money was a “loan” pending finalization of the promised “buy in,” in writing and then testifying under oath during his deposition that the “buy in” had actually occurred because Berryhill confirmed receiving payment, ultimately Berryhill denied the \$405,000.00 he received was *ever* a loan or that he *ever*

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<sup>3</sup> Berryhill TR., pp. 77-78.